85-1324

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

CHARLES H. KERKMAN

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Appeal from the Sixth Circuit Court of Appeals

PETITION FOR CERTIORARI — CRIMINAL CASE

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QUESTIONS PRESENTED

Does an unnecessary and clearly erroneous mid-trial ruling in favor of one defendant in a joint trial, which ruling everyone agrees deprived the other defendant, who did nothing to prompt it and objected to it, of an impartial jury, amount to a mistrial which precludes another trial pursuant to the Double Jeopardy Clause?

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CHARLES H. KERKMAN

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

—o—

On Appeal from the Sixth Circuit Court of Appeals

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PETITION FOR CERTIORARI — CRIMINAL CASE

—o—

Charles H. Kerkman hereby petitions this Honorable Court to issue to the United States Court of Appeals for the Sixth Circuit a writ of certiorari to review the judgment of that Court affirming the denial by the United States District Court for the Western District of Mich-

igan, the Honorable Richard A. Enslen, presiding, of his motion to dismiss on double jeopardy grounds the indictment currently pending against him.

OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix, *infra*, p. App. 2) was not reported, nor was the opinion of the District Court below (Appendix, *infra*, p. App. 5).

JURISDICTION

The judgment of the Court of Appeals below was entered on October 18, 1985. Rehearing was not sought. By order dated December 17, 1985 (Appendix, *infra*, p. App. 78), Justice O'Connor extended the time for filing a petition for writ of certiorari to and including January 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

> indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. The statutes under which petitioner is being prosecuted, though nothing herein turns on their terms, are 18 U.S.C. Sections 2, 371, 1341, 1343, and 2314, and 26 U.S.C. Section 7206(2). The pertinent text of said statutes are, because of their length, set forth in the Appendix, *infra*, pp. App. 80-83.

STATEMENT OF THE CASE

Petitioner, Charles H. Kerkman, and one co-defendant, Robert D. Fischl, were jointly named in ten counts of a twelve-count indictment returned in the Western District of Michigan on January 30, 1984. Those 10 counts charged each with wire fraud, mail fraud, interstate transportation of property taken by fraud, conspiracy to commit mail fraud and wire fraud, and conspiracy to defraud the Internal Revenue Service. Each defendant was also charged separately with one count of aiding and assisting in the preparation of a false and fraudulent tax return. The charges all arose out of the performance by the Upper Peninsula Shipbuilding Company, a corporation formed by

the defendants, of a contract with the State of Michigan to build an experimental tugboat and barge system.

Fischl, anticipating *Bruton* problems at trial, filed a motion to sever. That motion was denied on April 20, 1984. Reconsideration was denied on June 19, 1984. Fischl renewed his motion before trial, and on the day trial began, it was again denied. It was eventually granted in the midst of trial after the Government had rested and during testimony by petitioner. It was granted on Fischl's request, although it was petitioner's case which was severed.

Trial began on August 20, 1984. The Government completed its proofs on September 12, 1984. Fischl rested without presenting any evidence. Trial was adjourned to September 18, 1984. During the recess, the Government filed a motion to exclude the testimony of a witness it expected petitioner to call, and it asked to have the jury instructed that petitioner's evidence could be considered against Fischl. When Fischl rested, the jury had been told that the case against him was finished. The court declined to rule with regard to the prospective witness until petitioner had attempted to lay the proper foundation. Petitioner took the witness stand. After approximately one hour, his counsel advised the court that he was about to question petitioner about statements by Fischl. Fischl's counsel objected, asking the court to either instruct the jury to ignore anything said by petitioner about Fischl or to allow him to cross-examine petitioner. The Government renewed its request that the jury be instructed that it could consider petitioner's evidence against Fischl.

The jury was excused. Fischl renewed his motion to sever. The court concluded that because "it [would] fly

in the face of the rights [of Fischl]" to allow petitioner's evidence to be used against him, it had only two options: give a strong limiting instruction, or "grant a partial severance" (Appendix, *infra*, pp. App. 20-22). It summarily did the latter, announcing that it would submit the case against Fischl to the jury immediately and "adjourn the case of United States v Kerkman until the jury has returned a verdict, at which time I will reinstitute the case against Mr. Kerkman" (Appendix, *infra*, p. App. 21). Then the Court asked counsel for "any comments" (Appendix, *infra*, p. App. 23). No one had any.

The jury was called back into the courtroom, told about the severance, and again excused. The court and counsel agreed which alternate juror would be excused. Thereupon, petitioner and his counsel left. A few moments later, before court reconvened, petitioner's counsel returned and asked to address the court. He objected to the proposed severance, explaining that a guilty verdict against Fischl would put petitioner in the "indefensible position of now having to overcome a conclusion that has been reached by the jury on the very point in [sic] which he is offering the testimony" (Appendix, *infra*, pp. App. 28-30). He also asked for a mistrial "if the Court has decided to separate and send it up for deliberation" (Appendix, *infra*, p. App. 29). The Court refused to reconsider (Appendix, *infra*, pp. App. 30-31). The jury was summoned and the agreed-upon alternative was excused. After lunch, the jury heard closing arguments and instructions in Fischl's case. It found him guilty of six counts. Petitioner was named in five of those counts.

The case against petitioner was scheduled to resume on October 2, 1984, before the same jury. He had to re-

sume his own testimony, and he planned to present eleven additional witnesses. Prior to that date he filed a motion to dismiss, claiming that prosecutorial misconduct had deprived him of an impartial jury. The court denied the motion to dismiss, but it did grant a mistrial on its own motion. Petitioner had refused to request a mistrial, although he asked the trial court to grant one on its own motion, and he stated that, if the trial court would not grant a mistrial on its own motion, he would request one (Appendix, *infra*, pp. App. 41-44, 60). The Government conceded that the severance had so tainted the jury to entitle petitioner to start fresh in front of another jury (Appendix, *infra*, pp. App. 36, 47). The trial court acted on its own motion, noting that it would have done so even if petitioner had insisted on proceeding (Appendix, *infra*, p. App. 74).

Trial was scheduled for December 3, 1984. On November 2, 1984, petitioner filed a motion to dismiss on double jeopardy grounds. He complained that the mid-trial severance amounted to a mistrial to which he had objected and for which there was no manifest necessity. The motion was denied on December 19, 1984 (Appendix, *infra*, p. App. 5). The trial court ruled that the mid-trial severance was not tantamount to a mistrial, so that the operative mistrial was that denominated as such and granted on October 2, 1984, to which mistrial petitioner had consented, and which mistrial had not been prompted by government action intended to cause a mistrial. The court also ruled that petitioner had not "legitimately object[ed] to [the] severance" (Appendix, *infra*, p. App. 11), so that, if the mid-trial severance was tantamount to a

mistrial, petitioner had consented thereto, eliminating any double jeopardy complaint.

The case was appealed to the Sixth Circuit. On October 18, 1985, that court issued an unpublished per curiam opinion (Appendix, *infra*, p. App. 2) affirming the denial of petitioner's motion to dismiss. While recognizing that "the circumstances which gave rise to the ultimate decision to carry [sic] a mistrial are indeed regrettable and cannot fairly be said to have arisen because of any fault of defendant or his counsel," the court was satisfied that the declaration of a mistrial was occasioned by manifest necessity. It is apparent from the opinion that the court considered as the operative termination of the first trial, not the mid-trial severance, but the mistrial granted after the jury had convicted Fischl.

On November 8, 1985, petitioner's counsel sought permission to withdraw. That permission was granted on November 25, 1985. Current counsel was then appointed. He asked Justice O'Connor for an extension of time within which to file a petition for writ of certiorari. Without an extension, the petition was due on December 17, 1985. An extension was granted (Appendix, *infra*, p. App. 78) to and including January 16, 1986. Trial has been adjourned pending resolution of this petition (Appendix, *infra*, p. App. 79).

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JURISDICTION BELOW

There is currently pending against petitioner in the United States District Court for the Western District of

Michigan, Southern Division, an indictment charging him with four counts of wire fraud in violation of 18 U.S.C. Section 1343, two counts of mail fraud in violation of 18 U.S.C. Section 1341, two counts of interstate transportation of property taken by fraud in violation of 18 U.S.C. Section 2314, one count of conspiracy to commit wire and mail fraud, and one count of conspiracy to defraud the Internal Revenue Service, both in violation of 18 U.S.C. Section 371. An appeal was taken to the Sixth Circuit, even though the charges against petitioner have yet to go to verdict, pursuant to *Abney v United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

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ARGUMENT

A writ of certiorari should be allowed in this case because the Court of Appeals decision sought to be reviewed decided an important question of federal law which has not been, but should be, settled by this Court, and because that decision conflicts with decisions on the same matter by other federal courts of appeal.

Although the primary purpose of the Double Jeopardy Clause is to protect the integrity of final judgments in criminal cases, that Clause also protects the separate but related interest of a defendant in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made, *United States v Scott*, 437 U.S. 82, 92, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65 (1978). That latter protection derives from a defendant's " 'valued right to have his trial completed by a particular tribunal.' " Even

if the first trial is not completed, a second prosecution may be "grossly unfair." Such a prosecution, even if it results in eventual vindication, imposes financial and emotional burdens on the accused, and prolongs the period during which he or she is stigmatized by an unresolved accusation of wrongdoing. And, a second prosecution may enhance the risk that an innocent defendant may be convicted. Witnesses have been known to "improve" their testimony. Consequently, as a general rule, the government is entitled to only one opportunity to require an accused to stand trial. See *Arizona v Washington*, 434 U.S. 497, 503-505, 98 S.Ct. 824, 829-830, 54 L.Ed.2d 717 (1978).

However, unlike the situation in which a criminal trial has ended in an acquittal or conviction, retrial is not automatically barred whenever a criminal proceeding is terminated short of a verdict. If the case was ended at the behest of the defendant, a retrial may proceed, unless the defendant was goaded into asking for a mistrial by government conduct intended to provoke such a request, *Oregon v Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Because a motion for a mistrial is a "deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact," allowing a retrial is not unfairly burdensome to the defendant, unless the Government deliberately provoked the request, in which case holding the defendant to have consented to another trial would make a hollow shell of the protection against double jeopardy. On the other hand, an objection by a defendant to a mistrial should not be controlling, and is not. Because a variety of circumstances may necessitate discharging a jury before it has rendered a verdict, not all of which create any unfairness to the ac-

cused, and because the public has a right to have the prosecution present its evidence to an impartial jury, when a trial is terminated before judgment over the objection of the defendant, retrial is not barred if the prosecution can demonstrate that there was a "manifest necessity" for the mistrial, *Arizona v Washington*, 434 U.S. at 505, 98 S.Ct. at 830; and *Oregon v Kennedy*, 456 U.S. at 672, 102 S.Ct. at 2087.

In sum, therefore, it appears that, when a criminal case has ended prematurely, a claim that double jeopardy precludes another trial is resolved by answering one of two questions: (A) If the defendant requested the mistrial, or consented to it, did the government intend to provoke that request? If not, another trial is permissible. (B) If the defendant objected to the mistrial, was it justified by manifest necessity? If so, another trial is permissible. If not, the case is over. This case demonstrates, however, that those questions are not as simple as they appear, consisting, instead, of several components, and that this Court has spoken definitively on only one of those components.

In *Oregon v Kennedy*, *supra*, this Court retreated from a generalized standard of "bad faith conduct" or "harassment" on the part of judge or prosecutor to a bright-line test of intent to provoke a motion for a mistrial. The former amounted to a test without standards; the latter, although not free from practical difficulties, "is a manageable standard to apply," 456 U.S. at 675, 102 S.Ct. at 2089. On the other hand, "manifest necessity" is not a standard which can be applied mechanically or without attention to the particular case. The test is one of

"sound discretion," *Arizona v Washington*, 434 U.S. at 506, 514, 98 S.Ct. at 830-831, 835. Therefore, guidance on what is manifest necessity can come only case by case. This case presents an opportunity to give content to that standard.

This case also demonstrates that there are other unanswered questions in double jeopardy analysis: Can a trial court decision other than a "mistrial" denominated as such invoke double jeopardy analysis? Can the timing of a mistrial—well into the proofs, for example, instead of early in trial—be of double jeopardy significance? What is required of a defendant to adequately object to a mistrial to require a manifest necessity decision?

A.

Throughout its opinions on double jeopardy, this Court uses the term "mistrial" to describe when double jeopardy considerations become relevant. This case asks the question, Must there be such a declaration denominated as such, or can other terminations of a criminal case before verdict raise double jeopardy considerations? At least three of the Circuit Courts of Appeal have held that mid-trial severances are tantamount to mistrials and, as such, invoke double jeopardy considerations. See *United States v Posner*, 764 F.2d 1535, 1539 (11th Cir, 1985); *United States v Glover*, 506 F.2d 294 (2d Cir, 1974); and *United States v Tinney*, 473 F.2d 1085, 1089 (3d Cir, 1973). In this case the Sixth Circuit held otherwise. In his appeal to that Court petitioner explicitly argued that the mid-trial severance amounted to a mistrial and that, since he had objected to it, a retrial was barred unless the severance had been prompted by some manifest necessity. The Govern-

ment argued that the severance was not the effective equivalent of a mistrial, so that petitioner's consent to the mistrial granted after the jury's partial verdict precluded any double jeopardy complaint by him and that the taint to the jury, should it consider his case, constituted manifest necessity for that mistrial. The Sixth Circuit's opinion discussed only the latter argument of the Government's, agreeing with it. Necessarily, therefore, the Sixth Circuit rejected the claim that the mid-trial severance amounted to a mistrial, putting it at odds with the Second, Third, and Eleventh Circuits.

The Sixth Circuit's decision in that regard is also at odds with this Court's prior decisions, although not so directly. The Double Jeopardy Clause is not a fragile guarantee which can be easily avoided. While not irrelevant, form is not to be exalted over substance in determining the double jeopardy consequences of a "ruling terminating a prosecution," *Sanabria v United States*, 437 U.S. 54, 66, 98 S.Ct. 2170, 2180, 57 L.Ed.2d 43 (1978). The characterization of an action does not control the classification of that action for purposes of double jeopardy analysis, *United States v Scott*, 437 U.S. at 96, 98 S.Ct. at 2196-2197. "Legal consequences ordinarily flow from what has actually happened," *Sanabria v United States*, 437 U.S. at 65, 98 S.Ct. at 2179. In this case what happened was a mid-trial ruling which effectively terminated the prosecution of petitioner. That result inevitably followed from what the Government agrees is unanimous case law decrying the bifurcation ordered by the trial court in this case. See *United States v Crane*, 499 F.2d 1385 (6th Cir, 1974); *United States v Stratton*, 649 F.2d 1066 (5th Cir, 1981); and *United States v McIver*, 688 F.2d 726 (11th Cir, 1982).

Therefore, the legal consequence of the severance should be consideration of its double jeopardy implications.

B.

Were petitioner claiming that he is entitled to dismissal of the charges against him because the mistrial denominated as such and granted on October 2, 1984, in response to the jury's conviction of his co-defendant was an improper termination of the case against him, his failure to object to that mistrial would prevent him from avoiding a second trial. While he did not consent to that mistrial in so many words, he did not object. Instead, he asked the trial court to declare a mistrial on its own motion, and his counsel announced that, if the trial court did not so act, he would request a mistrial (Appendix, *infra*, pp. App. 41-44, 60). That probably amounts to consent, although there remains the question of whether petitioner "retain[ed] primary control over the course to be followed." The trial court said that it would have declared a mistrial even if petitioner had insisted on submitting himself to the jury which had already convicted his co-defendant (Appendix, *infra*, p. App. 74). However, the effect of that statement by the court need not be considered. What petitioner claims was the termination of the case which calls for double jeopardy consideration was the mid-trial severance to which he objected.

The trial court characterized petitioner's objection to the severance as "inadequate," but that is not so. True, petitioner did not immediately object. However, he was not given any meaningful opportunity to object, and he did object, for precisely the right reason as it turns out, while there was still time for the trial court to change its

mind, something it refused to do. The trial court, when confronted by what it saw as possible prejudice to Fischl, did not ask petitioner for any suggestions on what to do. The Court simply announced, twice, as a matter of fact, that it was granting Fischl's renewed motion to sever. Only thereafter did the Court ask counsel for "any comments" (Appendix, *infra*, p. App. 23). No one had any. After thinking about the situation, petitioner's counsel did object to the severance because of the "indefensible" situation his client would find himself in if the jury convicted Fischl (Appendix, *infra*, p. App. 29). At the time of that objection, the jury was intact; the alternate had not been excused. The jury had been told nothing more than that it was going to consider Fischl's case first (Appendix, *infra*, pp. App. 23-26). Had the trial court decided to undo the severance, or to sever Fischl and submit his case to another jury, it could have been done. In other words, petitioner's objection, although not immediate, was in time to effect the outcome. The fact that petitioner also then asked for a mistrial does not alter the situation. The mistrial was requested only after the severance had been ordered and only in the event the court persisted in its severance decision (Appendix, *infra*, p. App. 29). Since the court did persist, the effective mistrial occurred with the severance. Petitioner objected to that. Therefore, the severance does not bar another trial only if there was manifest necessity for it.

C.

Were petitioner relying on the mistrial declared after the jury's verdict against Fischl, the inherent error in the severance would amount to a manifest necessity, preclud-

ing double jeopardy problems. As this Court held in *Illinois v Somerville*, 410 U.S. 458, 463, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973), "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." However, petitioner is not relying on that mistrial. He is claiming that the mid-trial severance was tantamount to a mistrial and that it was not precipitated by manifest necessity. The fact is that there was no need to separate Fischl's case from petitioner's. Because petitioner was subject to cross-examination, any testimony by him implicating Fischl presented no *Bruton* problems. *Nelson v O'Neil*, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 1723 (1971); and *California v Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), and there would have been nothing inappropriate in allowing the jury to consider against Fischl whatever evidence was offered by petitioner. See, for example, *United States v Belt*, 574 F.2d 123 (5th Cir, 1978); *United States v. Polizzi*, 500 F.2d 856, 902-903 (9th Cir, 1974); *United States v Zambrano*, 421 F.2d 761 (3d Cir, 1970); and *Rickey v United States*, 242 F.2d 583 (5th Cir, 1957).

There also was a viable alternative to severing petitioner from the case. Fischl's case could have been the one severed and submitted to another jury. He was, after all, the one complaining about the supposed unfairness of having to endure a trial with petitioner. In *United States v Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), a plurality of this Court held that the failure of a trial court to consider less drastic alternatives to a mistrial was a factor to consider when evaluating whether a given

mistrial was manifestly necessary. In *Illinois v Somerville,* 410 U.S. at 465-466, 469-471, 93 S.Ct., at 1066, 1071-1072, 1073-1074, a majority of this Court stated *Jorn* in a fashion which appeared to reaffirm that consideration of less drastic alternatives is part of the discretion involved in declaring a mistrial. Some of the Courts of Appeal so read this Court's decisions. See, for example, *United States v Pierce,* 593 F.2d 415, 417 (1st Cir, 1979); *United States v McKay,* 591 F.2d 218, 222 (3d Cir, 1979); and *United States v Tinney, supra,* at 1089. In this case the Sixth Circuit decided otherwise. Therefore, this case presents this Court with an opportunity, not only to state clearly whether an evaluation of manifest necessity is to include consideration of other alternatives, but also to resolve the conflict in the Circuits on this issue.

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CONCLUSION

What happened in this case is likely to recur. As multi-defendant trials become more common, the need for mid-trial corrections to avoid unanticipated harm to one or more co-defendants will increase. If, as happened in this case, the co-defendant who is not the beneficiary of the correction is forced to resubmit his case to another jury, joint trials, in addition to the other risks of prejudice they present, will have a high constitutional price; they will weaken the protection against double jeopardy. To the extent that the double jeopardy implications of joint trials remain unanswered, fear of uncorrectible problems may encourage needless pre-trial severances out of fear that mid-trial severances will result in defendants

avoiding trial on the merits. This Court has yet to consider double jeopardy protection in the context of a multi-defendant trial, *United States v Glover, supra,* at 295, fn 9. Until it does, the efficiency which comes from joint trials will be jeopardized. and joint trials will risk very severe constitutional burdens on defendants. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submited,

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UNITED STATES OF AMERICA,

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APPENDIX

NOT FOR PUBLICATION

No. 85-1141

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES H. KERKMAN,

Defendant-Appellant.

On Appeal from the United States District Court for the Western District of Michigan.
(Filed October 18, 1985)

Before: ENGEL and KEITH, Circuit Judges; and WISEMAN,* District Judge.

PER CURIAM. Petitioner Charles H. Kerkman appeals from the order of the United States District Court for the Western District of Michigan, denying his motion to dismiss on grounds of double jeopardy in the criminal action brought against him.

Kerkman and Robert D. Fischl were jointly indicted on January 30, 1984 for various offenses including mail fraud, wire fraud, conspiracies, interstate transportation of property taken by fraud, and aiding and assisting in the preparation of a fraudulent tax return.

A joint trial commenced on August 20, 1984. The court denied Fischl's pretrial motion for severance. After the government rested, Fischl declined to present any evidence and rested his case. The court instructed the

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* The Honorable Thomas A. Wiseman, Jr., United States District Court for the Middle District of Tennessee, sitting by designation.

jury that the case against Fischl was closed. Kerkman then took the stand and began to testify on his own behalf. The government requested that the jury be allowed to consider Kerkman's testimony in deciding Fischl's case. On September 18, following approximately one hour of Kerkman's testimony, the court granted severance and prepared to submit the case against Fischl to the jury for immediate decision. Kerkman made no immediate objection to the severance, but soon after moved for mistrial because of the prejudicial effect of the jury's deliberation on Fischl. The court denied Kerkman's motion for mistrial. The jury found Fischl guilty on six counts of the indictment, five of which also named Kerkman.

On September 26, Kerkman filed a written motion to dismiss which the court heard on October 2. At the hearing the court and the parties agreed that the jury had been tainted, but the court denied Kerkman's motion to dismiss. Neither party would then willingly move for a mistrial for fear of adversely affecting his prospects on appeal. Consequently, the court declared a mistrial *sua sponte* on grounds of manifest necessity.

On October 3, 1984, the government filed notice of its intent to retry Kerkman. Kerkman moved on November 2 to dismiss on double jeopardy grounds. The court denied Kerkman's motion on December 18.

On appeal, Kerkman contends generally that he was deprived of his right to fairly complete the first trial and that the double jeopardy clause therefore prohibits a second trial. More specifically, he contends that the order severing the trial was tantamount to a declaration of mistrial, and if this is so that the severance was not manifestly necessary.

While the circumstances which gave rise to the ultimate decision to carry a mistrial are indeed regrettable and cannot fairly be said to have arisen because of any fault of defendant or his counsel, the court, upon a careful consideration of the record as a whole, is satisfied that the trial court's declaration of a mistrial was occasioned by the kind of manifest necessity which has been held to preclude the appellant's claim that his retrial violated constitutional principles of double jeopardy. *United States v. Wilson*, 534 F.2d 76 (6th Cir. 1976).

The court recognizes that appellant's counsel was not faced with a happy choice when the court and counsel mutually discovered that the premature submission of co-defendant Fischl's case to the jury had irretrievably prejudiced Kerkman's own right to a fair trial. However, the colloquy upon the record between the court and defense counsel left no doubt that the latter had expressed a preference to renew his previous motion for a mistrial if the court were to deny his motion to dismiss and compel him then to proceed with the trial before the original jury. Clearly, the decision to submit Fischl's case to the jury was error, there was a total absence of any bad faith or intent to harass or prejudice Kerkman. Under such unusual circumstances the declaration of a mistrial as to Kerkman and the decision to retry him do not violate his constitutional rights not to be put twice into jeopardy. *United States v. Dinitz*, 424 U.S. 600 (1976).

Accordingly, the judgment of the district court is AFFIRMED.

App. 5

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. G 84-17 CR

United States of America,
Plaintiff,

v

Charles Kerkman,
Defendant.

OPINION

(Filed December 19, 1984)

Following a declaration of mistrial on October 2, 1984, the trial of Defendant Charles Kerkman was rescheduled for December of 1984. The matter is now before the Court on Kerkman's Motion to Dismiss on grounds of double jeopardy.

The motion for dismissal focuses on two procedural events which occurred at trial—the September 18 severance of Mr. Kerkman's case from his co-Defendant's, Mr. Fischl's case, and the declaration of mistrial on October 2. Kerkman argues that the Court unnecessarily and improperly ordered severance, and unnecessarily declared a mistrial. The Government argues, in response, that because Kerkman did not object to severance at the time, he should be barred from complaining about the severance. Furthermore, the Government argues that the declaration of a mistrial was "manifestly necessary", so double jeopardy is inapplicable.

History of the Case

Defendants Charles Kerkman and Robert Fischl were jointly indicted by grand jury and charged with two conspiracies and various statutory violations including mail

fraud, wire fraud, transporting property, and filing false income tax returns. Prior to trial, Fischl moved for severance. The motion was denied at the time, but the Court indicated it would reconsider the motion in the event that severance was necessitated during the course of the trial.

From August 20 through September 13, 1984, the Government presented its case against Fischl and Kerkman. From the beginning of the trial, by design, counsel for Mr. Fischl was the first of the two defense counsel to speak. Thus, when the Government rested on September 13, it automatically became Fischl's turn to present his case. Fischl declined to present a case, however, and rested, and the Court informed the jury that the Fischl case was closed. Counsel for Kerkman was surprised by the rapidity with which Kerkman's case had come to the fore, and received a short continuance in order to prepare.

Prior to the reconvening of trial on September 18, the Government filed a Motion in Limine, requesting that the anticipated testimony of a Mr. Butch be admitted in regard to Fischl, as well as to Kerkman. The motion was not decided before trial reconvened.

When trial reconvened on September 18, Defendant Kerkman took the stand to testify in his own behalf. After approximately one hour of direct testimony, counsel for Fischl objected to the introduction of testimony concerning his client because his case had been closed (T 3).[1] The Government responded to Fischl's objection by reiterating its Motion in Limine and requesting that the jury be allowed to consider the forthcoming testimony as against both Kerkman and Fischl (T 5), and that the case against Fischl be reopened, generally (T 7).

The Court recessed to consider the alternatives (T 8), and after the recess discussed the most reasonable alternatives from the bench. The Court determined that it would be unfair to Fischl if further adverse testimony were offered against him under the circumstances (T 10), and that a limiting jury instruction would not adequately cure the unfairness (T 10-11). The Court concluded that the best course of action was to sever, and thereby relieve Fischl of prejudicial joinder, as well as preserving Kerkman's ability to fully defend himself (T 11-12).

Having ascertained from Fischl's counsel that Fischl's Motion for Severance was still before the Court (T 9), the Court granted the severance. The Court directed that Fischl's case be submitted to the jury immediately (T 11), and that Kerkman's case later be tried to the same jury with a strong limiting instruction at the completion of Kerkman's proofs (T 12). The Court asked the parties if there were any objection to the proposed course of action, and there was no objection (T 12-13). The cases were severed, the jury informed of the action, and a recess taken (T 13-16).

The parties adjourned to chambers, where a juror was deselected by agreement of counsel, and a tentative schedule for the Kerkman case was set (T 16-18). Discussion of the Kerkman case ended, and Kerkman and his counsel left the chamber (T 18). The conversation of the Fischl case continued between the Court, Fischl, counsel for the Government, and counsel for Fischl (T 18-19).

Shortly after the conclusion of the Fischl conference, the Court reconvened the parties in open Court, at the request of Kerkman's counsel, at which time Kerkman ob-

jected to the severance and moved for a mistrial (T 19). In moving for a mistrial, Kerkman cited the potential prejudicial effect of severance (T 19-20). The Court denied the Motion for Mistrial (T 21-22).

The jury found Fischl guilty of six counts of the indictment.

On September 26, Kerkman filed a written Motion to Dismiss, arguing that the jury was tainted by its prior deliberation on the Fischl case and that the taint would deprive Kerkman of his constitutional right to a fair trial.

At oral argument on October 2 (T 32), the Court denied Kerkman's Motion for Reconsideration of his Motion for Judgment of Acquittal (T 38), and then addressed the parties' arguments regarding the jury taint issue (T 38). The parties and the Court agreed, having researched the issue, that the jury had been tainted impermissibly by deliberating on Fischl's case. Kerkman focused the argument on the single issue of whether dismissal or mistrial was the appropriate remedy (T 38), and argued that, because the government had intentionally caused the improper severance by insisting that Kerkman'stestimony be admitted against Fischl, dismissal was the proper remedy (T 40). The Government responded with the argument that the proper remedy was for the Court to offer Kerkman a mistrial (T 42).

At the same time, the Government suggested that, although jury taint had occurred, the cases still might go to the same jury (T 43). The Government acknowledged the very difficult posture of the case (Id), but declined to request a mistrial (T 45).

Similarly, Kerkman intimated he would move for mistrial, but requested that the Court first rule on the written Motion to Dismiss (T 47).

The Dance

There is no need to trudge point by point through the remainder of the Transcript. Suffice it to say the parties attempted to dance without moving their feet, each side tapping its toe in time with the song—the fact that the trial could not go on—but neither side willing to move in rhythm to the unmistakable music for fear of bending their appellate posture.[2] After attempting without success (T 43-55) to get a partner to dance to the clear refrain—"When the prosecutor agrees with the defendant that a jury is tainted, how can I submit the case to a jury!" (T 52)—the Court in an interlude, orally denied Kerkman's Motion to Dismiss (T 55-68).[3]

Having denied the Motion to Dismiss, the Court, humming that certain unmistakable tune again, asked Kerkman if he chose to alter his defense (T 68) or move for a mistrial (T 70). Counsel, toe still tapping in time, declined the honor of so moving, (T 70), although professing at length a ready admiration for a *sua sponte* motion (T 71-73). The Government, knowing how to dance but fearful of slipping awkwardly on any loose doctrine, nonetheless bravely put words to the music by noting the "manifest necessity" theme (T 73). It was some enchanted evening. I could have danced all night. The parties would, in fact, have tapped, tapped, tapped all night to the vague strains of the "manifest necessity" doctrine, had not the Court intervened and taken them by the hand and led

them onto the parquet floor of decision-making. The Court declared a mistrial on grounds of manifest necessity (T 90-91).

In examining the issue of mistrial, the courts must confront the imposing spectre of the double jeopardy bar to retrial. The parties, and the Government in particular, must carefully assess whether mistrial of a criminal defendant's case is necessary. If the Court, by a scrupulous exercise of judicial discretion, determines that justice requires a mistrial—if "manifest necessity" exists—then such a declaration is mandated and retrial is a fitting remedy. *United States v Jorn,* 400 US 470, 27 L Ed 2d 543, 91 S Ct 547 (1971), relying on the benchmark opinion of *United States v Perez,* 9 Wheat 579, 6 L Ed 165 (1824).

On the other hand, a mistrial not required by manifest necessity precludes retrial, because the individual's constitutional right to protection from repeated prosecution has been abridged. *Green v United States,* 355 US 184, 2 L Ed 2d 199, 78 S Ct 221 (1957). The prohibition against repeated prosecution avoids the unfair financial and emotional burdening of the Defendant, prolonged stigmatizing of the Defendant, and the statistically enhanced chance of conviction borne by the Defendant on retrial. *See, e.g., Arizona v Washington,* 434 US 497, 54 L Ed 2d 717, 98 S Ct 824 (1977).

The courts have been wary in discussing the manifest necessity doctrine. The courts are unwilling to provide an iron-clad rule and thereby create a predictable lever which the over-aggressive or the under-principled might use to pry themselevs out of a trial proceeding contrary to their liking.

Kerkman's formalistic arguments that the Fifth Amendment should bar retrial are unpersuasive in light of the transcript. Did Kerkman legitimately object to severance, and technically dodge the stain of involvement? No, although that is irrelevant. Did Kerkman object to the declaration of mistrial, and thereby dodge an even more damning stain of involvement? No, although again, it is an irrelevant question. Is severance tantamount to mistrial and therefore governed by "manifest necessity" doctrine equally with mistrial? No, because that novel juxtaposition of doctrines is unsupported by logic, by case law, or by the federal rules governing relief from prejudicial joinder; and again, it is an irrelevancy.

Conclusion

The sole relevant question is whether Charles Kerkman's case could have been tried to the jury on October 2, 1984. The single, obvious, relevant answer is ***no***. No amount of argumentation can alter that response.

A remarkably clear, linear set of ideas provide the answer to Kerkman's present motion for dismissal on double jeopardy grounds: (1) Fischl would have been unfairly prejudiced, had Kerkman's testimony been used against Fischl after Fischl's case was closed; (2) Kerkman would have been unfairly prejudiced if the Court had not permitted him to defend himself fully; (3) The benefit of a fair trial and an impartial jury for Fischl required severance; (4) The benefit of a complete defense for Kerkman necessitated severance; (5) After severance (or bifurcation) was effectuated, *United States v Crane* suggested mistrial; (6) Once the guilty verdict was rendered against Fischl by the jury, *Crane*, *Stratton*, and *McIver*

precluded Kerkman submitting has trial to the same jury; (7) Once submission of the case to the jury was absolutely precluded, any further proceedings became frivolous and financially and emotionally burdensome to all the parties; (8) To have subjected Kerkman to pointless litigation truly would have violated his Fifth Amendment right to be free from vexatious and repetitious litigation and would have invoked the double jeopardy bar, *Arizona v Washington;* (9) The spectre of the double jeopardy bar to retrial made mistrial a manifest necessity; (10) Because mistrial was necessitated in the interests of Fischl and Kerkman, who deserve a fair trial before an impartial jury, and in the interests of the public, which deserves the right to try its accused to conclusion, retrial is not barred by the double jeopardy doctrine, *Arizona v Washington.*

If Defendant Kerkman has a valid argument, it is that severance in this case was tantamount to mistrial, and severance is to be judged by the same "manifest necessity" doctrine as mistrial. Kerkman might then argue that severance was not manifestly necessary because alternatives were available. I reject that argument. The alternatives inevitably threatened great prejudice to either Fischl's or Kerkman's case. In light of the circumstances existing at that point in the trial, there was no viable alternative to severance.

Believing that the oral opinion issued by the Court on October 2 adequately expresses the conclusions of law in this matter, and finding no superseding logic in Kerkman's present argument, the Court denies the Defendant's Motion to Dismiss based on double jeopardy.

Dated in Kalamazoo, MI: 12/18/84

RICHARD A. ENSLEN
US District Judge

FOOTNOTES

[1]The transcript page numbers refer to the "Transcript of Arguments and Ruling on Issues of Severance, Motions for Dismissal, and Mistrial" as transcribed by the court reporter as of this date.

[2]Presumably, the Government's straightest, most correct posture is that it did not necessitate and then move for a mistrial; therefore, it is not guilty of overreaching. Presumably, Kerkman's best posture is that involuntary mistrial was forced upon him by prosecutorial misconduct or judicial error, so double jeopardy should bar retrial.

[3]Briefly, the Court relied on *United States* v *Crane*, 499 F 2d 1385 (CA 6 1974); McCree, J. dissenting; *United States* v *Stratton*, 649 F 2d 1066 (CA 5 1981); *United States* v *McIver*, 688 F 2d 726 (CA 11 1982) — all of which consistently hold that severence, or single jury bifurcation in a criminal case, such as the Court ordered in this case, results in *per se* jury taint, yet none of which suggests dismissal as the proper remedy.

(p. 2) SEPTEMBER 18, 1984

DIRECT/KERKMAN (MELDMAN)

TESTIMONY OF
DEFENDANT CHARLES H. KERKMAN

CHARLES H. KERKMAN, DULY SWORN

DIRECT EXAMINATION

By Mr. Meldman:

. . . . . .

Q Now I wonder if I could move you forward a little bit to about the 6th of June, 1979. Do you recall a meeting in Lansing, Michigan?

A Yes, I do.

Q Do you recall who was present at that meeting?

A Yes, I do.

Q Who was that?

A Mr. Kuehl from Germany, and he was accompanied by Mr. Schwarz, and we had a meeting on that day into the evening hours with those two gentlemen.

Q Do you recall what took place during that meeting?

A Basically, I do recall.

Q All right. Let's see if we can't start out in the morning of the 6th and very briefly tell us did you have any conversations with Mr. Kuehl?

A On the morning of the 6th, I doubt it. I think if my memory is right, they came in midday, early afternoon, whatever, whatever the plane records show.

(p. 3) Mr. Meldman: Your Honor, if I may, I am going to ask the witness to repeat the conversations had with Mr. Kuehl. I do so not for the truth of the statements made

by other participants, but simply for the fact that it was part of the state in mind, and the fact that the statements were made. And in anticipation of an objection so we can get the testimony.

Mr. Gèzon: Well, I have no objection to him repeating what Mr. Kuehl and Mr. Schwarz have said, but also Mr. Fischl is going to be there. He is going to be making statements also, and those are statements of a party opponent, and, perhaps, we better have a clarification of that:

The Court: I haven't heard anything from Mr. Daavettila.

Mr. Daavettila: Your Honor, I think as we get into this area, I do think that it is appropriate that the Court consider the posture of the parties, particularly Mr. Fischl, and the prosecution, where both sides have rested, and I would like some guidance from the Court on where we are going, what our role is with respect to the presentation.

The Court: What do you mean, you want some guidance? I am not going anyplace. I am just listening to the question.

Mr. Daavettila: I understand that, your Honor. But in view of the fact that the prosecution has rested, and (p. 4) we have rested, either I would like an instruction to the jury that the jury should not consider this evidence as it relates to Mr. Fischl, or I would like the opportunity to cross-examine, and the state — or — excuse me — the government has made a motion yesterday asking for certain —

The Court: Well, you better not bring the motion on in front of the jury I guess we better remove the jury.

(Whereupon, jury leaves.)

The Court: Go ahead, Mr. Daavettila. I have cut you off.

Mr. Daavettila: As the government — as you are aware, the government yesterday made a motion to reopen its case, and I would like to know whether or not the government is going to be granted that opportunity. Frankly, I object to that. The government has put in its case and vis-a-vis Mr. Fischl, and I think that, that in view of the posture that they have taken they ought to be held to that. Likewise, we have rested, and I think that the Court has got to make a determination as to whether or not this witness is in a position now to testify with relationship to the role if any that Mr. Fischl played in these events, or whether he ought to be restricted, whether or not the other witnesses ought to be restricted.

And also, the basic question is, myself as counsel for Mr. Fischl, do I have a role in cross-examining (p. 5) these witnesses, or do I not? I very frankly, in my experience, I have never been in this position where I have had to try a case jointly where one of the parties has rested, and I am really — I am really, can't draw on my experience to re — know what my role is. Frankly, I would like the opportunity to question the witness, but if part and parcel of that is that the government has the opportunity to reopen their proofs as to my client, I will forego it. If it is a quid pro quo. I want — I want — one way or the other, I want to know where I stand so that I can guide my conduct appropriately.

The Court: What is your intention, Mr. Gezon?

Mr. Gezon: My intention is to ask the Court to have the testimony of this witness be considered like the testi-

mony of any of the witnesses in this case, and let the jury be allowed to use it to evaluate both the case against Mr. Fischl and against Mr. Kerkman.

The Court: You want the testimony of Mr. Kerkman — defense — to be used against a witness that has already rested, or a case that has already rested.

Mr. Gezon: Yes, because the jury is addressing both conspiratorial charges of these two men together, and they are addressing aiding and abetting charges, acting in concert. And I guess I find it legally inconceivable that they can listen to Mr. Kerkman say what if anything that he (p. 6) and Mr. Fischl did or said between other parties, and use it as opposed to Mr. Kerkman and not as opposed to Mr. Fischl. I submit that when we have a conspiracy charge, and they are joint defendants, the testimony such as this is to be used by the jury to assess the guilt or innocence of both parties.

The Court: Except that wouldn't have happened if there had been a separate trial. You couldn't have called Kerkman, and Kerkman wouldn't have testified in the Fischl case.

Mr. Gezon: That is true. As we know from going over all of the cases, a defendant is not entitled to a severance or a separate trial simply because he wants to get on the stand and the other man doesn't. Probably, 90 percent of the conspiracy trials in this country are among joint defendants and multiple charges, and the courts recognize that simply because there are two defendants doesn't mean that we have to have separate trials. There are jury instructions that can be given, and—

The Court: Well, what about the re-opening? You haven't answered that. What do you mean by it? I guess I don't know what you mean by re-opening.

Mr. Gezon: My idea procedurally with that, Mr. Daavettila rested, and there — and the Judge made the statement to the jury that the evidence is all done in the case. And I think procedurally, I think the Court perhaps (p. 7) didn't have to make that statement and make that conclusion until all of the evidence is in, in the case. Therefore, I think procedurally perhaps the better way to go is to instruct the jury that the proofs are open as to both parties. Because if we have one or two people with one or two defendants, on the stand, talking about his half of the conversation, they are not going to get at the truth or the circumstances.

The Court: Is he going — Mr. Meldman, is he going to testify about things that Mr. Fischl said or was present, or that you anticipate? The question now comes from the Kuehl conversation?

Mr Meldman: There may be two instances that that could happen. I don't — I don't — toward the end of this meeting, I believe there may be some testimony of some conversations that Mr. Kerkman and Mr. Fischl may have had with, with Mr. Kuehl, yes.

The Court: The June 6th meeting?

Mr. Meldman: Yes.

Mr. Gezon: Also, Your Honor, it is clear that by the time Mr. Kerkman gets to Germany there is going to be testimony about communications between Mr. Fischl and Mr. Kerkman shortly before he left, and there is going to

be conversations about two phones, or the phone calls while they were there, and how they handled the money when they (p. 8) brought it back.

The Court: Well, I don't know that. Is that true?

Mr. Meldman: I don't anticipate any testimony about how the money was handled when it came back. I think that we stipulated that we have no problem, and I don't want to take the Court's time to go through that. I hadn't anticipated that. I don't think that is a disputed fact.

The Court: I don't know if that is coming in or not.

Mr. Meldman: I don't know. I have no —

Mr. Gezon: Well, Your Honor, I have a lot of questions of Mr. Kerkman about this on all of the charges that he is faced with, which includes those instances, and I am going to ask some questions about those matters. Mr. Meldman has decided to call this witness, and once he calls the witness, all facts and incidences pertaining to all the charges have to be gone into.

The Court: Well, I will think about it. We will take a recess.

(Whereupon, recess, 10:15 a.m.)

The Court: You can stay over there, Mr. Kerkman. You don't need to come back. I would like somebody to close the door. The Court has before it a thorny problem, and I guess I didn't completely appreciate it yesterday, but certainly did today when I heard from Mr. Daavettila. And the issue is this as I see it.

(p. 9) In the first place, Mr. Daavettila on behalf of Mr. Fischl has asked for severed trial, and I believe if I

am not mistaken made a motion for me to reconsider that. Is that right?

Mr. Daavettila: That is correct, Your Honor.

The Court: And the record is clear that what happened in this case is the United States put in its case against Fischl and Kerkman, and rested, and then simply because Mr. Daavettila was the next up by virtue of a coin flip he rested his case. And the case of United States vs. Fischl concluded last Thursday sometime. It was the contemplation, I think —this is my own thought of the lawyers in this room, and certainly my contemplation — that defendant Kerkman was not going to testify. That is just how I understood Mr. Meldman last Thursday when he said he was looking for — he had one witness, and the case would be over on Tuesday or so. And I told the jury that. It is obvious to me that there was reconsideration on the weekend which is certainly understandable, and the defendant Kerkman decided to testify, and has started to testify.

There have been no other witnesses offered by the defendant except out of the presence of the jury, and an attorny named Butch took the stand, and the voir dire process, began to testify, but not in the presence of the jury.

Defendant Kerkman's testimony to date has been (p. 10) more or less chronological, and has not even mentioned Mr. Fischl. As a matter of fact, he has used the word "we" two or three times relating to conversations that he had with the Michigan Department of Transportation, and "we made a presentation," or "we went there," and I was wondering what he meant. Did he mean Mr. Fischl went with him? Did he use "we" in the colloquial sense in

the, in the corporate sense, whatever? Then at a moment when he was about to relate a conversation that took place in Lansing, Michigan, on June 4th or 6th, I think it is the 6th, about which the jury has heard testimony from Mr. Kuehl and Mr. Schwarz, but no others, it became apparent to Mr. Daavettila, and it had previously become apparent to Mr. Gezon, that what was about to be offered by Kerkman was going to be used against Fischl.

As a matter of fact, that is so clear that there was a motion filed in limine over the weekend by Mr. Gezon, in essence, asking to do that. Now the question is, is that permissible, and does it fly in the face of the rights of any of the parties in this room? The answer is it does. The question is, what can the trial court do about it?

And there are only two things the trial court can do about it that I have decided in the recess. One is that I can give a strong limiting instruction to the jury, (p. 11) telling the jury among other things that what Mr. Kerkman says in his own defense cannot be used against Mr. Fischl, whatever is said. It is clear to me that, for example, the prosecution can rebut Mr. Kerkman's case but cannot rebut Mr. Fischl's case. Mr. Fischl put nothing it. So the prosecution would neither be permitted to re-open as to Fischl, nor would the prosecution be permitted to rebut against Fischl. It would be permitted only to rebut against Kerkman who is putting in some evidence. That is very, very clear.

The second option that I have is to grant a partial severance right now which I am going to do. I am going to submit the case to the jury immediately as to the United States vs. Fischl, and adjourn the case of United States vs. Kerkman until the jury has returned a verdict, at which time I will reinstitute the case against Mr. Kerkman.

That is the only thing that I can do to preserve Mr. Fischl's rights. The absolute only thing that I can do.

Is there support for it? My goodness, yes. After thinking of it, I looked to see if there was any support, and I found all kinds of support, Weinstein, Section 105[02 105] 04, "Relief From Prejudicial Joinder," a comment made only in the amendment to the original book, author's comments, quote:

> (p. 12) "It has even been suggested that when the confession of the co-defendant comes as a surprise at the trial" — I don't have any idea if there is a confession coming — "it may be error to deny a motion or to grant a mistrial."

Well, the motion that is before me is a motion for severance. It has been ruled on once by me, reinstituted and ruled again by me, and now in part I grant that motion. That is to say, I am going to submit the case this morning to the jury on United States vs. Fischl, and we will take up the case of United States vs. Kerkman the minute or the next day after the jury deliberates on the Fischl case. That will avoid, of course, any prejudice to Mr. Fischl because so far Mr. Kerkman has said nothing that would even remotely relate to Mr. Fischl. And all of the proofs are in on Mr. Fischl. There is nothing to rebut because Mr. Fischl put in no evidence.

The case is ripe for the jury, and that is exactly what we are going to do.

Now I will listen to any comments when I bring the jury back and give them a little recess, while we go over the jury instructions that are applicable to Mr. Fischl, to your

client, and not applicable to Mr. Kerkman. Okay. Any comments, Mr. Gezon.

Mr. Gezon: Just along the lines what the Court said. (p. 13) We are going to have to amend the instructions. I would ask for a moment — we will have to have some time, sure.

Mr. Daavettila: No comment, Your Honor.

Mr. Meldman: I don't think we have any, Your Honor.

The Court: Good. Bring the jury back, please. It prolongs our proceeding, and I regret that, but I can think of no other thing to do.

One thing we will have to do is deselect the juror now, and I don't see that that harms your client, Mr. Meldman, at all. We will just have to do it and get rid of the juror forever.

Mr. Meldman: I have agreed —

The Court: I will talk about that with all three of you if you would like to.

Mr. Gezon: Would we also instruct them that the testimony this morning is not —

The Court: Yes, of course. I don't think there is anything to worry about because I just don't — do you, Mr. Daavettila? I haven't heard a thing.

Mr. Daavettila: I have no problem with this morning's testimony.

The Court: Good.

(Whereupon, in court, with jury, 10:50 a.m.)

The Court: Please be seated. Jury, you started to hear an argument about something that caused me some concern (p. 14) in the break, and I thought about it, and I have decided to do something, something that I hadn't planned on doing. I am going to do it. I am going to sever the case of United States vs. Fischl from the case of United States vs. Kerkman.

Now I told you some time ago that you should consider those cases separately anyway, but now I am at a point where I must do it in my judgment, and I am going to. So we are going — I am going to submit the case to you very quickly, possibly today, on United States vs. Fischl. You will not only not get the United States vs. Kerkman case, but it is not over as you well know. Mr. Kerkman has started to testify. We have no idea what other evidence Mr. Kerkman may offer or not offer. That is not going to be relevant to us.

We are going to have to take a recess right now and restructure the situation that is coming up next, and deselect one of you because we are ready to go to you right now. We have heard the United States say last Thursday that it rested its case against both defendants. And we heard Mr. Daavettila say that he rested his case for defendant Fischl. Everything is in on Fischl. Everything is not in on Kerkman, and I am going to take the consideration of the United States vs. Kerkman away from you at this stage, and that is going to require the lawyers, the lawyers and I to get together on the instructions before we even listen to (p. 15) arguments.

And I want you to understand that — you may not have understood it — the lawyers are entitled to under-

stand what I am going to instruct you about as to the law, and I have told them that. They don't. Unfortunately, my instructions were designed as to both Mr. Kerkman and Mr. Fischl. So, consequently, there is going to be a period of time here, I don't know how long it will take, in which we straighten that out, and we will try to get back to you and submit the case to you today as to United States vs. — I think we will succeed in doing that, by the way.

So you will be, no doubt, having a lunch hour today and working all day, and that will continue until you reach a verdict with regard to Mr. Fischl. Now once you reach the verdict with regard to Mr. Fischl, we will pick up the case of Mr. Kerkman again right where we left it off. And then we will let Mr. Kerkman finish his case, see if there is any rebuttal from the United States. The evidence will finally close there, and we will submit the case against Kerkman to you, but at that time it will only be against Mr. Kerkman. It is a different procedure, and not one that I contemplated, and not one that last Thursday that I thought would happen.

Things have changed since last Thursday as trials sometimes do, and that is what we are going to do. (p. 16) Right now we will recess. I can't tell you how long the recess will be, but you will be coming back in later this morning to hear arguments involving Mr. Gezon, and Mr. Daavettila, of course, not involving Mr. Meldman. And the case is going to be over, happily, very shortly. So we will — and one of you is about to leave, and leave forever. The one that leaves will have to stay left in the Kerkman case, too, because that is the only way that we can do it. We are — I am going to ask you — we will adjourn, and ask you to

leave, and ask the lawyers to, I would like to see all the lawyers first, and then I would like to see Mr. Gezon and Mr. Daavettila and Mr. Fischl alone. That is how we will proceed. We will recess.

(Whereupon, 10:55 a.m., recess.)

(In chambers)

The Court: The record should reflect that the jury is not present, and in chambers both defendants and their lawyers, and the government is present. And the question is this: at the beginning of this trial, I believe that I said as to alternate jurors we would deselect the one or two that were left at the conclusion of the case blindly unless, and I underscored the word unless, the parties, the government of the United States, Mr. Fischl, and Mr., ah, Kerkman unanimously agreed that one or more jurors should be excluded I would exclude that juror, to reduce ourselves to twelve.

(p. 17) We would just let the lawyers select the alternate in this case, and I got a hint from the courtroom that Mr. Meldman was interested in the subject, and that is why I adjourned in here before he got away from us, and to see if there was a juror that everybody agreed upon. And I ask anybody. Is there or is there not?

* * *

Mr. Gezon: I think they are also thinking of that same person. May I take the list, too? I will step out.

(Whereupon, Mr. Gezon leaves the chambers.)

The Court: While he steps out, is that agreeable to you, Mr. Kerkman, to excuse that juror?

Defendant Kerkman: Yes.

The Court: All right, and Mr. Fischl?

Defendant Fischl: Yes, Sir.

The Court: All right. Then I can see unanimous consent among the defendants. We will just wait to see if the government agrees.

(Off the record, interim.)

The Court: Let's go back on the record on this juror. Mr. Gezon?

Mr. Gezon: I am satisfied we are all talking about . . .

The Court: And we will have to keep that jury of twelve intact until October, I think. At this stage, I would (p. 18) like to excuse you, Mr. Meldman, and your client, and you are welcome to stay or leave, or whatever, but I won't be calling upon you to proceed until October 1st, and the record should probably show this. We talked about this off the record. The Court had all day Wednesday to devote to this case, and Thursday, and still does. The Court did not have Friday, nor Monday, Tuesday and Wednesday the following week. Mr. Meldman announced to the Court some time ago that the Thursday and Friday of that week, which would be the 25th and 26th of September, were Jewish holidays, and I would never require a lawyer to work on a religious holiday.

So I indicated to him that we would not recommence or we would not try the case at all during the week of September 24th, and that still holds. So the Kerkman

case will pick up again on Monday. I believe it is Monday, October 1st. If there is any problem with that, I will let you know. In the back of my mind, it struck me that we were supposed to wait until Tuesday, October 2nd, and my secretary is not here. I can't check it. But there seems to me there is something wrong with that. Off the record.

(Off-the-record discussion. Defendant Kerkman and his attorney, Mr. Meldman, leave the court chambers.)

(In chambers, the Court, defendant Fischl, his attorney, Mr. Daavettila, U. S. Attorney, Mr. Gezon.)

The Court: On the record. I want to, the record to reflect that I have gone through the pack — let me make a (p. 19) better record than that. Monday morning I gave both lawyers copies of my proposed instructions, and sometime Monday they both met with Mr. Parsons, my law cleck, and they made a total of, as I think I put on the record yesterday, 23 objections to the proposed instructions. And although the rules don't require this, I find it very helpful to get input from the lawyers before I finally charge the jury. Sometime yesterday, I went through those 23 requests for additions or requests for deletions from all sides, and made my final determination as to what I was going to charge the jury. And at 8:30 this morning, when the jury was brought in, I handed all the lawyers my packet of jury instructions. When I decided to sever the Fischl-Kerkman trials, it required the lawyers and the defendants to go over what ought to be changed and altered in instructions that would relate to only defendant Fischl, and that has been completed to my satisfaction, and to the satisfaction of the lawyers in my judgment.

* * *

(Whereupon, in court, without jury.)

The Court: Mr. Meldman told me during the recess that he wished to address the Court, and it is all yours, Mr. Meldman.

Mr. Meldman: Thank you. Your Honor. On behalf of the defendant Kerkman, we would like to object to the proposed severance of defendants at this point. We believe that this will be injurious to the defendant Kerkman for thi- reason:

(p. 20) The jury has been instructed and properly so not to discuss this case with each other. We believe that by having them deliberate in the matter of U. S. vs. Fischl that they are in fact going to come to a conclusion as to a good majority of the evidence that is applicable to both, and we believe that should a finding of guilty be brought back by the jury on the conspiracy that it would put the defendant Kerkman in an indefensible position of now having to overcome a conclusion that has been reached by the jury on the very point in which he is offering the testimony, which would be the conspiracy. And I — I can't find how he could present any evidence that would give him a fair trial at that point, a conclusion having been reached among the 12 jurors.

The Court: Never know when you are finished.

Mr. Meldman: I believe I am finished. I don't know whether it is the proper way to make the motion, but I think at this point if the Court has decided to separate and send it up for deliberation on that point, I think we would have to move for a mistrial. I don't know of any other proper procedure to use. That is what we would do at this time.

The Court: Okay, Mr. Daavettila, do you wish to be heard at all on that motion?

Mr. Daavettila: No, Your Honor.

The Court: Mr. Gezon, there is a motion for a (p. 21) mistrial. How do you wish to respond to that?

Mr. Gezon: I oppose it.

The Court: All right. The Court denies the motion for a mistrial, and believes that it can instruct the jury with respect to Mr. Kerkman fairly easily. With regard to the conspiracy, I don't find any merit to Mr. Meldman's argument. If the jury finds — were to find Mr. Fischl guilty, they would have to find there was a conspiracy, and they would have to find that Mr. Fischl was part of the conspiracy, but in doing so they do not need to find that Mr. Kerkman was part of that conspiracy, and I would have to instruct them that they would have to consider the matter all over again when Mr. Kerkman's trial resumes, and I will give them several cautionary instructions.

In addition to that, I will give cautionary instructions in the Fischl case with regard to that. Yes, they will be discussing with each other clearly the, will have to discuss with each other almost all of the elements of the Fischl case with the exception of the Count 11, and I think — which only relates to Mr. Fischl — because both defendants are mentioned in both. I believe that I can give a successful cautionary instruction for them both at the Fischl trial and at the Kerkman trial to, to make a separate consideration, which is essentially what I am asking them to do even if they went out together.

(p. 22) My instructions as Messrs. Gezon and Daavettila know were, are laced with comments about how they have to make separate considerations as to each one and because if one is guilty does not mean the other one, and so forth, which now won't need to be there, and they will be considered separately. And in many respects it is fairer to both Mr. Kerkman and to Mr. Fischl than if the jury went out and decided both together because this way it seems to me the jury is crystal clear that they are only considering one thing at this stage, that is, Mr. Fischl's guilt or innocence, I think on 10 counts, whatever is there, 11 counts maybe — 11 I think. And then when Mr. Kerkman's trial comes back, it will be equally fair to Mr. Kerkman. They will only be considering Mr. Kerkman and not Mr. Fischl, and the motion for a mistrial that is now made is denied.

Mr. Meldman: Your Honor, we would ask one other thing. May we start at the point of opening our case in chief?

The Court: Yes.

Mr. Meldman: So we are in a posture now where we have not called Mr. Kerkman?

The Court: I think that — I don't know. I haven't thought about that. Certainly, that is true as to the Fischl case because I am not going to permit them to listen to anything that he said. As to whether you have opened up your (p. 23) case, let me take that under advisement. Some merit. How do you understand that, Mr. Gezon?

Mr. Gezon: I have some obvious problems with that. There are a lot of things that are said already that we are going to vigorously rebut.

The Court: The only thing that I want you to think about, and supply the information to me in the intervening time — and now the intervening time is going to be quite a substantial amount of time — and one thing that I would like you to think about, Mr. Meldman, and you, Mr. Gezon, is that at the time that that testimony started I have not granted the severance, and I have now granted the severance, and that may change the status of things. I may need to think about it.

Mr. Meldman: Your Honor, there are two reasons: Number one, there is a two-week lapse of time. I don't think the jury's memory would be that good. I have to start over anyway.

The Court: I would like to have some law in the intervening time, and serve it on me, and, Mr. Gezon, the same thing.

Mr. Gezon: I have no objection to Mr. Meldman if he wants to somehow summarize, the next time we get together.

The Court: I don't know if that is what he is talking about. He may be talking about altering his defense.

(p. 24) Mr. Meldman: Absolutely, Your Honor. I think we are in a different posture than where we started.

The Court: I understand your argument. It has some appeal to me. I don't know where we stand on the law. Mr. Gezon, I would like both of you to address that issue to me in advance of October 1st. I think it is a significant issue. I simply don't have to rule on it right now. I am not going to. Bring the jury back, please. We are going

to adjourn them for one hour. I might say in passing at this time on your motion for a mistrial, Mr. Meldman, that, that you don't know what posture you are going to be in. The argument would have been considerably different to me if the jury finds Mr. Fischl innocent of any or all of the charges I think. Since none of us in this room knows what the jury is going to do, I certainly can't find any prejudice.

(Whereupon, in court with jury.)

The Court: Just be seated, please. Please be seated, everybody. Jury, in your absence, we have shaken the machine, and in chambers, and drawn out the juror that has been deselected. I feel badly that anybody has to be deselected this late. I don't think the word deselected is right. That is the wrong word.

* * *

(Whereupon, juror referred to withdrawn.)

11:35 A.M.

* * *

OCTOBER 2, 1984, HEARING

(p. 38) That it seems to me has to be decided, and as I indicated, I agree with Mr. Kerkman. Before I take up the issue of Mr. Kerkman's motion to dismiss, since all counts against Mr. Kerkman are currently in place, and since I have received one good brief from Mr. Meldman and one good brief from Mr. Gezon, and then another brief from Mr. Kerkman which just came this morning, I don't know that arguments are necessary, but I think it would be helpful.

So I would let Mr. Kerkman argue first in support of his motion or motions, and then the government, of course, and we will see where we are. Mr. Meldman.

Mr. Meldman: Thank you, Your Honor.

The Court: You are welcome.

Mr. Meldman: Your Honor, I think rather than reiterating what we put in the brief, I would simply point out to the Court that I think the government and the defendant in this case both concur that we have a taint of the jury. The question now is what is to be done, whether it should be a motion for mistrial, a motion for dismissal.

(p. 39) I suggest to the Court that in the situation here where we believe that the taint was caused by the government action, by the government's insistence that the testimony of Mr. Kerkman be applicable to both cases, that, that equity should come into play.

I think as we have indicated in our brief either the defendant or the government can appeal from the order of the Court, and I think that in this particular case that

the financial hardship that Mr. Kerkman has gone through, the emotional strain, and the fact that had the government not insisted that this evidence go into both cases, that should be taken into consideration in deciding which way to go. I think that a motion to dismiss where there is a termination of the proceedings as the court in Scott has indicated of fundamental error is a situation that we have here, and we simply ask that the burden be placed back to the government to proceed.

The Court: That was the Scott case that you cited?

Mr. Meldman: Yes.

The Court: I couldn't decide when I read your brief what government misconduct you are talking about. Now I understand what you are saying. It is because of the government's insistence upon using Kerkman's testimony against Fischl?

Mr. Meldman: Your Honor, our reading of Oregon vs. (p. 40) Kennedy — I have to tell the Court that I am not a constitutional scholar, and I don't pretend to be. I am a tax attorney. I don't think it has to be a malicious action as I read Oregon vs. Kennedy. I think it has to be intentional. If intentional has the meaning in this context that it does at least in the tax area, that it is other than accidental, I don't think it has to be malicious. I don't think it has to be with bad purpose. I think there is no question that the government intentionally did what it did do.

The Court: But that is the act? I wasn't clear in the brief.

Mr. Meldman: Yes, and I don't suggest that it was done maliciously at all. And I just simply think that is the crux of the argument.

The Court: I did not understand that until just this minute. Now I do.

Mr. Meldman: I have nothing else.

The Court: Okay. Mr. Gezon.

Mr. Gezon: I also just got —

The Court: Do we have a tainted jury, Mr. Gezon?

Mr. Gezon: I don't concur in that, Your Honor, but I recognize and concede to the great weight of authority which has been researched and put into motion with Mr. Meldman.

The Court: Sounds like you are agreeing with it.

(p. 41) Mr. Gezon: The point that I want to respond to is in Mr. Meldman's reply memorandum —

The Court: I want you to respond to several things, but take it in any fashion that you want.

Mr. Gezon: All right. I will comment then on his last assertion that the government conduct forced the situation. In my reading of cases involving double jeopardy, where it is claimed that the prosecutor's misconduct forced the issue, it appears to be that cases point to the fact situations where matters are actually brought before a jury which are of a tainted nature. Questions are asked, and evidence which is very prejudicial has been brought, and was received by the jury.

We must recall that the Court has been particularly careful, and I think the attorneys have been cooperative to bring matters up outside of the presence of the jury whenever we thought that it might be a matter that should be done that way.

The Court: I have just paused to say that I think that has been true consistently. Mr. Meldman, yourself, and Mr. Daavettila as well. I don't think that anybody has tried to sneak anything in front of the jury in this trial that I can remember from anybody's side.

Mr. Gezon: And following up on that point, when this matter came up, it was outside of the presence of the (p. 42) jury, and counsel were vigorously representing their positions on evidentiary issues, and I think it would be a perversion of the Supreme Court cases on double jeopardy and mistrial to say that vigorously asking that evidence be admitted or vigorously opposing that outside of the presence of the jury is equating that with prosecutorial misconduct of a nature trying to prejudice the jury. We were representing our positions.

I particularly was asked by the Court, I believe, in that discussion before we separated the cases whether or not this brings into focus again the matter of a severance of Mr. Fischl, that Mr. Fischl had asked for previously. I indicated that it did, but again I pointed the Court to the cases that indicated that severance is necessarily needed when two defendants have an antithetical theory of the case, or one wants to testify and one does not — that is beside the point. I submit this is not a case where there has been any intentional attempt to forfeit the

defendant's right to a fair trial by a jury in this case. Unfortunately, we are at the point where we are at in the case, and we have to make some tough decisions, and I think the remedy is the defendant should be offered a mistrial.

This is the same thing as if we are, we are talking about a tainted jury, that is, a jury with impartiality has been improperly affected. Most of the cases talk about a situation where somebody in the back of (p. 43) the courtroom jumps up with a newspaper headline and flashes it in front of the jury or the attorney, and the witness gets in and blurts out in front of the jury something that shouldn't be gotten into, and at that point in time it is conceded that the defendant has a right to mistrial. It is his option to take this jury and to take his chances with the present jury, albeit tainted in some ways or to ask for a new jury. That procedure is roughly what we call a mistrial.

A dismissal is something altogether different, from some pretrial — from some pretrial procedural error of some kind, improper evidence, to support the Fifth Amendment problem. In this case, what the defendant really should be asking for is a mistrial and not a dismissal, and I would oppose a dismissal of any kind.

The Court: Stay up. Supposing the defendant does not ask for a mistrial, Mr. Gezon. Then what?

Mr. Gezon: If the Court would inquire, and the defendant should choose to say that I do not want a mistrial, the Court is in a very difficult position because according to the cases Mr. Meldman has cited this taint is of a very

substantive matter. It goes to the heart of things. But really, doesn't any prejudice that affects the jury when a mistrial is asked for go to the heart of the matter? That is, taint of an impartial jury. I suggest if the defendant wants to go on with this jury, he could. He could waive (p. 44) mistrial.

Because, in effect, anytime that a defendant when prejudicial information has come before a jury waives the decision and doesn't ask for a mistrial, even though the court may suggest that you may have one if you want one, that has in effect waived that partiality of the jury. And in an imperfect world you don't always have perfect juries.

In this case, we have had a very intelligent discerning jury. We could tell that by perhaps what they have done so far in their attentiveness at this point in time, in their cooperation. They have listened several times when the Court has instructed them on evidence issues, and the Court has instructed them on evidence issues in this case. But I, I say the option is with the defendant. And if he wants to go on, I think we ought to go on.

The Court: Stay up. I am not through with you yet. There is some conflicting sentiment on the part of the defendant before the Court right at this minute. That conflicting sentiment as I recall it, it comes in two different fashions. One, the defendant has indicated to the Court at the commencement of the trial how badly he wants the trial to be terminated. He supported that with a letter from a psychiatrist or a psychologist I think that I found to be compelling, and it went to the issue of discharge by, or Mr. Meldman's withdrawal, other things.

(p. 45) One of the things that was clear in that monologue from the defendant in the, and the letter, was that the defendant wants the trial over with. So we have that knowledge already. We also have the knowledge that through his counsel on about 15 or 20 minutes after I declared the severance Mr. Meldman made a motion for mistrial.

Assuming that he is speaking for his client, that presents a conflicting item for me to consider with regard to the question of mistrial. What about the — let's let me ask you in a, in an arguendo question.

Arguendo. I don't ask the defendant if he wants a mistrial, and there is no current motion before the Court. What is the government's position on mistrial vis-a-vis Arizona, the Arizona case? That is the case that I read sustaining the right of the prosecution to ask for a mistrial.

Mr. Gezon: I would be ready to go on with this case because this is a very unique situation as I say. It is a situation which is not, did not involve matters that have directly been forced, permanently presented to the jury by either the attorneys or the judge. I would not ask for a mistrial.

The Court: All right. Anything else you want to tell me?

Mr. Gezon: No, Your Honor.

The Court: Mr. Meldman, what is your position?

(p. 46) Mistrial was not argued by you just now. You heard the questions that I put to Mr. Gezon. I will listen

to anything that you want to say with regard to that. I mean, assuming that you are right, and the prosecution seems to agree with you — I mean that I don't understand the prosecution's argument. We have a tainted jury, but we can go to the jury anyway. That doesn't make any sense to me whatsoever.

We have two lawyers that agree on one thing, and I don't understand the prosecution's not moving for a mistrial, either, frankly, but having heard it, and listening to this kind of nonsense, we have a tainted jury, we can go anyplace, what is your position with regard to a mistrial?

Mr. Meldman: Your Honor, I don't know. I will have to ask my client.

The Court: Maybe we can take a—

Mr. Meldman: May I suggest that we did ask for a mistrial?

The Court: Yes.

Mr. Meldman: And the government at that point —

The Court: Opposed it. That is right. I don't know if that position is still current with me. I denied it. In fact, you didn't first make it as I recall.

Mr. Meldman: Your Honor, I have to be honest. As I said to Mr. Gezon this morning, in 22 years I can never remember being speechless. I just didn't know what to say.

(p. 47) The Court: I wish—

Mr. Meldman: I would ask before conferring with my client on it, we would ask the Court to make a ruling on

the motion to dismiss, before asking him to make a decision on the mistrial. I don't —

The Court: I think that is —

Mr. Meldman: He is between a rock and a hard place no matter what he does.

The Court: I think that is maybe a fair comment from you, Mr. Meldman.

Mr. Meldman: You are absolutely right about the ambiguity and the problem that the defendant has. No question that he wants it over with. At what cost was the question.

The Court: I will say this, and I will put this on the record later, but I think it is important. You have asked an important question, and you are entitled to an important answer. My inclination is to deny the motion for a dismissal for reasons that I will state later. I think for solid legal reasons. But I also think for pragmatic reasons.

Consequently, the only thing that is probably going to be before me is the question of whether the government refuses to move, whether I delve into it myself, or whether I listen to a motion made by Mr. Kerkman.

Mr. Meldman: I think that is what we would ask, if (p. 48) the Court intends to make a motion sua sponte.

The Court: I don't know the answer to that.

Mr. Meldman: I think that would have a lot to do with what we do. If the Court says no, I think we are in a position where we finally have to make a decision. I would like to be the last one to make it if we could.

The Court: I am not going to give you that choice. I am going to recess a minute so you can talk to Mr. Kerkman. I will even give the government a chance to reconsider its position if it would, and I will come back.

(Whereupon, recess, 9:30 a.m.)

The Court: Mr. Meldman.

Mr. Meldman: Your Honor, I have conferred with the defendant Mr. Kerkman. I will make a statement to the Court, and with the Court's permission Mr. Kerkman would like to make a statement. Mr. Kerkman says that if this situation arises where he has to make a decision as to whether or not to proceed with this trial, or request a mistrial, that, although that probably is not really a decision, at least in his opinion, he feels that he has no choice, and he will have to ask that the proceedings that we are in now be terminated.

It is his opinion now that he could not obtain a fair and impartial trial by the jury we have, and if his only remedy is a mistrial, then that would be the remedy that he would have to accept. And he is well aware of the fact (p. 49) which the Court has expressed that the emotional and financial hardship that that would entail is great.

He just feels that he has no choice. It wasn't a choice to make. That was the only choice that he had. If that occasion arises, that is what he would do and if in fact that is what we do do, then he would like to make a statement to the Court. Now I understood the Court —

The Court: I think you would rather have me decide — you are sort of making a tentative motion for a mistrial, and you would rather have me resolve the issue of dismissal you have got before me.

Mr. Meldman: Well, my understanding was, you were asking what we would do. You had told me, as I understood it, that you were going to deny the dismissal. You didn't indicate whether the Court on its own was going to make the motion.

The Court: I see what you are saying.

Mr. Meldman: I don't understand how the government cannot do it, either, other than the fact that I read the brief.

The Court: I think the answer is that Mr. Gezon has not read Arizona. I think that is the only answer that I can conclude when I walked back inside.

Mr. Meldman: I suggest alternatively that Mr. Gezon (p. 50) can make it that the Court can make it sua sponte on its own. We would not object to that and —

The Court: As I understand Mr. Gezon, and I understood his argument this morning, he is asking me to create double jeopardy. I am just not going to do it. He is saying we have a tainted jury, and go ahead and submit it to the tainted jury. And under the two cases that I have had, I think that rises to the level of a Fifth Amendment violation.

I can't imagine why he asks me to do it because it is the end of the case if he asks me to do it. I am going to reconsider that, if you really want me to do that. I think you ought to act very carefully on behalf of your client.

Mr. Gezon: I think the position that I would, would make, we are here on the defendant's motion to dismiss, and he alleges prosecutorial misconduct when he is alleging that.

The Court: I wasn't asking about the mistrial. That is true. You are right as far as you have gone.

Mr. Meldman: I think that is not true. We haven't alleged prosecutorial misconduct.

Mr. Gezon: Well, that is a rather loose term that was used.

The Court: He is saying the raison d'etre for, of the severance was your comment.

(p. 51) Mr. Meldman: Yes.

The Court: About wanting to re-open the case. It is just that simple.

Mr. Meldman: I don't consider that to be a malicious act, and I think that is what prosecutorial misconduct is.

The Court: I have read Oregon now, and Oregon seems to talk about the word intent, did the prosecutor intend to do what he did. In that case, Mr. Gezon, you may not have read it, what the prosecutor, he said something to a witness on the witness stand, did you associate with so-and-so, and he said no. And the prosecutor said is that because he was a crook. And then the court said that the prosecutor was intending to avoid a judgment of acquittal by his conduct in that line of questioning. And then the court zeroed in on the word intent, what does that mean. Is that bad, good, whatever. It means intent. He intended it, to do that. That is what he intended to do. To focus this case for you because I don't know if you have it focused, when Meldman filed his first brief, he went off on — although he mentioned Scott — he went off essentially on three cases, one a Sixth Circuit case, one regarding sever-

ance, and argued, although I thought not persuasively, that the only remedy available to a court was dismissal.

Then you filed your brief, and you appeared (p. 52) to agree with Mr. Meldman with regard to the taint of the jury, and Mr. Meldman understood that, and read that, and came back with a second brief, this time focusing on U. S. vs. Scott, and arguing as you heard him argue a few minutes ago, well, something is going to have to happen here, and equitably if dismissal is considered by the Court, then if it is done for reasons under the Scott decision, it would be the government's responsibility to carry the case up to the Court of Appeals. And he framed that as sort of an equitable thing to do because you are the guy that made the comment I am going to re-open against Fischl, and all of that sort of stuff.

That is the posture we are in right now. Behind that, of course, is the question do — just ignore that for a moment. Just forget there is a motion to dismiss before the Court.

When the prosecutor agrees with the defendant that a jury is tainted, how can I submit the case to the jury?

Mr. Gezon: Because, my reading of the cases on mistrial and double jeopardy shows that the defendant has the right to take a jury that has received prejudicial information and take it to the conclusion. The double jeopardy is something that—it is his option, and the cases that I have read, including the Oregon case, when the court on its own motion over the defendant's objection, or the (p. 53) prosecutor's motion, goes for, grants a mistrial, the test is whether there is manifest necessity made out, and in that

situation the court and the prosecutor acts in its jeopardy because then the court of appeals in their infinite wisdom may disagree that there was manifest necessity, and the defendant wanted to take his chances, quote, with the first jury, then double jeopardy is attached.

We are in the posture here where I am not in one degree alleging that the defendant tried to prejudice the jury in any way. If that were some situation, I would say that I could move for a mistrial under the Arizona case, or it is — but in this case, we are here on a motion because the defense is claiming the prosecution caused this mistrial or caused this situation which ultimately will lead to a decision of dismissal or mistrial. In that posture, I can't see moving for a mistrial on my own.

I think it is a situation where the defendant as with any prejudiced jury, where a mistrial is being considered, can decide whether to go on or not. On the scale of things, this is a mistrial, shall we say, of grand proportions compared to, say, a single incident of some kind of evidence coming in, but in this situation I think that the defendant has the choice.

The Court: Let me tell you something. Stay up. I am still talking to you. Let's assume that I don't grant (p. 54) the dismissal, and that is what I have already told Mr. Meldman, I am not going to grant the dismissal. I will tell you why in a few minutes. We still end up with a tainted jury by your own admission in your brief.

Mr. Gezon: Well, that conclusion, I don't necessarily agree with you. But, go ahead. I will accept that.

The Court: All right. Let's assume that Mr. Meldman proceeds with the same defense that he started, and

puts on evidence, Mr. Kerkman, the lawyer whose name — Butch. Under that set of circumstances; there is no question about the jury being tainted. There is no question.

Mr. Gezon: You mean the jury —

The Court: There is no question because he hasn't put his defense in before the jury has met. By all of the cases that we have put in here, that is the worst set of circumstances that could happen.

Mr. Gezon: And we assume that the jury convicts.

The Court: And we assume that the jury convicts.

Mr. Gezon: And the test, Your Honor, is not whether or not on appeal that conviction would stand up. I concede it probably would not, but that is not the test. The test is whether the defendant or whether we go with manifest necessity, mistrial, or whether the defendant wishes to waive that taint and go forward. For example, we cited a previous (p. 55) case, the Stroudt case. Assuming that case, let's see, was a little more grievous, and the Court — and the defendant in that case asked for a mistrial, and the Court denied it and went forward. And that case was turned over on appeal as it probably would have been in the Sixth Circuit law. The court in effect said that that is something that the defendant considered by the Court inquiring do you want a mistrial, do you want me to make a motion for a mistrial. He said I don't want to, I want to go forward with this jury now, tainted as it is, and he made that choice, and therefore waived any —

The Court: What is your point? I understand that. What is your point?

Mr. Gezon: The point is, at this point in time, if a dismissal is proper, certainly a consideration of a mistrial is. It is up to the defendant whether he wants to mistry or go forward.

The Court: Well, I think I have to decide on the dismissal issue, to turn my mind to something else. The motion to dismiss is before the Court. It was put before the Court in a motion filed after the bifurcation and was responded to by the government, and was replied to by Mr. Meldman, and, initially, there were three that I at least thought — in the first brief filed by Mr. Kerkman there were three essential cases relied on. There are now really four (p. 56) as I see it, and I think that I need to talk about them on the record with regard to the motion to dismiss. First and foremost, perhaps, is United States vs. Crane which is the Sixth Circuit speaking, and at 499 F.2d 1385, a 1974 case. Crane maintains that the safest course of conduct for trial courts is to sever the defendants entirely where Bruton problems may arise. The court nevertheless in Crane upheld the conviction of a defendant whose case went to the jury after the jury already had a co-defendant not guilty.

The court reasoned that because the jury had found the co-defendant not guilty there was no apparent prejudice, i.e., no apparent predisposition on the part of the jury to find guilt. In a dissent, Judge McCree, no longer on the court, posited a per se rule against bifurcated single jury criminal trials. Judge McCree reasoned that the second defendant's right to an impartial trial is violated because his counsel cannot take full part in all matters leading to the first deliberation, such as, Judge McCree suggested,

formulating jury instructions and closing argument, and the jury may, therefore, formulate a predisposition which the second defendant's counsel has no way to cure, even if his or her superior talents are exercised at a later date.

Then there is the Stratton case, United States vs. Stratton, which is a Fifth Circuit case in 1981, cited at 649 F.2d 1066, which my law clerk refers to as the "bird" case (p. 57) because of all of the subheadings written by somebody on the Fifth Circuit.

The Stratton court in this "bird" opinion adopted apparently the McCree per se rule. The case dealt with a complex indictment arising from state judicial corruption and misconduct in Florida.

Originally, there were nine co-defendants. Of those nine, two were severed. One was given a judgment of acquittal during the course of the trial. Two were acquitted, leaving four defendants who were convicted on part or all of the counts, and who appealed to the Fifth Circuit.

The bifurcation in the Stratton case arose from a situation far different from the one present in the Kerkman trial in that a defendant became seriously ill and was hospitalized. The trial court ordered his case bifurcated, and the jury received all of the government's evidence in regard to the other cases as well as the defense's to those cases, and went into deliberation. Only after the jury returned a verdict did the ill defendant's defense commence to the same jury. In addition to other procedural eccentricities in the case, the fact that the jury had returned a guilty verdict before one of the defendants began his defense indicated that the jury was predisposed to find guilt against the subsequent defendant. The Fifth Circuit, therefore, remanded for a new trial.

(p. 58) It is also of passing interest, but only in the Fischl case, that the Fifth Circuit remanded the other three defendants who had been tried and convicted for a retrial, calling it a close case. There is an additional quotation in the Stratton case that illustrates and sums up the nature of the issues raised by bifurcated single jury trials, quote:

> "The error committed was not that the jury was allowed to consider the guilt," parenthesis, "the first defendant's cases," end parenthesis, "prior to considering the guilt of the second defendant. Rather, the error was that the jury was prejudiced because it was allowed to consider Smith's participation in the offense charged, before Smith completed the presentation of his defense. Hense, Smith could not present his defense to an impartial jury."

That comes out of page 1082, footnote 24. That statement from the Fifth Circuit would seem to suggest that if Kerkman is now finished with his case — and if — and there is some evidence that he is from the transcript — then that may be less dangerous than if he had a defense yet to produce, again putting the U.S. in a strange position as I read the transcript because as I read the transcript Mr. Gezon would object if Mr. Meldman wanted to withdraw Mr. Kerkman from the (p. 59) witness stand, and that would put it in the worst possible posture.

One doesn't know, but it is clear what Mr. Meldman wanted to do on the last day of the trial. His comment is: "Absolutely, Your Honor, I think we are in a different posture than where we started."

Mr. Gezon at that stage was trying to suggest that what Mr. Meldman wanted to do was summarize the testimony of Mr. Kerkman. That is not what Mr. Meldman was doing at all. He was suggesting that he might want to rest now that there was a bifurcation, and that may make a difference with regard to Stratton. It may make a difference for the reason that I just indicated — before the presentation. I repeat it, underline it, and underline it, and underline it, and quote it for the government's benefit, quote: "Before Smith completed the presentation of his defense." "Hence, Smith could not present his defense to an 'impartial jury.'" So there is no question in Stratton that if the defendant has additional evidence to produce the jury is tainted. There is no question about it at all if Stratton applies, and I have to consider that Stratton would apply. The Stratton footnote goes on to say, however, quote:

> "Indeed, had Smith not suffered his heart ailment and had all four defendants' cases gone to the jury at the same time, there would have been no error in (p. 60) the jurors' first deliberating on the guilty of" — of three defendants — "and then considering the guilt of" — the subsequent defendant.

Hence, Stratton stands for the proposition in my judgment that if Mr. Meldman now rests as he indicated that he wished to do, there will be possibly no error, but Mr. Gezon does not want him to rest. He wants that witness to stay on forever, thereby creating the Stratton problem, which would require, absolutely require that the case not be submitted to the jury.

Then there is United States vs. McIver, which is an Eleventh Circuit case in 1982. McIver involved three de-

fendants who allegedly conspired to import marijuana. Two of the defendants put their cases on after the government rested, and then the jury deliberated. After finding a guilty verdict, the jury was brought back, at which time the third defendant put his defense on. The government added no new evidence and referred to the subsequent case as still, quote, "the same case' in loose terms in its closing remarks.

The jury then convicted the third defendant. The Eleventh Circuit ruled that the jury had been tainted and was predisposed to find guilt. The McIvor court said there was no possibility of giving a curative instruction in such a circumstance, and it cited both Stratton and Crane in so holding. The court said, quote:

> (p. 61) "The dispositive factor in both cases is that the prosecution presented all its evidence in the first phase of the trial but the defense was postponed until after the jury deliberated." That is at page 730 of McIver, which starts at page 726 of Volume 688.

McIver, therefore, is in accord with Crane and Stratton.

None of the three cases indicate what the Court ought to do at the trial level when this occurs, particularly if Mr. Meldman should now choose to rest Kerkman's case without actually opening it, in a technical sense.

The point I think of all three cases with regard to the motion to dismiss, and with Scott, is that there is no reason to dismiss. The Court of Appeals in the Crane case upheld the conviction because there had been a not guilty in the first case, and the Court of Appeals in the Fifth

and Eleventh Circuits simply remanded the cases for a new trial.

Dismissal would accomplish nothing by a trial court under that kind of logic, and the same thing is true in my mind under Scott. It is true that the reason why I severed the cases is because of the government's comments about reopening on Fischl, which greatly disturbed me. That is the reason why I granted the severance. So the reason of the (p. 62) severance was what the government did, and there is no question about it, and it was intentionally done.

But does that mean that there should be a dismissal? I find no logic to the conclusion that there should be a dismissal. It is the kind of reason why a court considers a mistrial. Mr. Gezon talks about the case tried in this case, in this court, United States vs. Stroudt, where the government intentionally and but without malice made a reference to the fact that the defendant hadn't testified in the case, and more than one time. When an objection was made in the closing argument, I excused the jury, and pointed out to the defendant essentially that he could have a mistrial if he wanted one. The defendant did not want a mistrial.

For that reason, I brought the jury back and attempted as best I could to give a curative instruction with regard to the government's remarks, and the jury retired and found the defendant guilty of one or more counts.

The case went to the Sixth Circuit, and the Sixth Circuit, in essence, indicated that because the defendant had an option to cure the defect by getting a fresh jury, and did not avail himself of that, that there was no error in submitting the case to the jury.

I guess the real point is that in considering all four of those cases I don't find any of them leading me (p. 63) to the resolution of dismissal. They just don't lead in that direction, and they don't accomplish anything, either, although that is no reason to make the decision. They don't accomplish anything. If in fact it is true that I were to grant a dismissal, and that Mr. Gezon had the right to appeal that, from what I have read of those cases the Court of Appeals would simply send the case back to be re-tried. We would be no further ahead than we would be now, and in many senses Mr. Kerkman would be much worse off because there would be this lengthy delay of an appeal that might last a year or whatever, resulting it seems to me at least in the great probability that the case comes back for a trial. Under whatever grounds I grant the dismissal, if I grant it on the basis of McIver, or Crane, or Stratton, or if I grant it on the basis of Scott, it seems to me that it doesn't accomplish anything. Nor is it indicated by the Courts of Appeal, including the Sixth Circuit. That is not the remedy I should look at, and so the motion to dismiss made by Mr. Meldman on behalf of Mr. Kerkman is denied.

Now that isn't the end, obviously. The Court does not know at this moment what Mr. Meldman intends to do, but if Mr. Meldman intends to put on his client and or additional evidence, then it seems to me clear that he cannot permit that evidence to go to this jury, just absolutely clear. It would be error of the most manifest kind. The (p. 64) closer question that is presented is if Mr. Meldman wants to rest his case, avoiding some, all of the error in Stratton, avoiding all of the error in Stratton, and probably avoiding the majority of error in Crane, but certainly not the Judge McCree dissent.

To put this case in its current posture, reminding the record what happened, the government made the remarks about wanting to re-open against Fischl, and was listening to Mr. Fischl's counsel heatedly object, but at that time when he had rested his case, and the government had rested its case, that there appeared to be forthcoming some testimony from Mr. Kerkman that would be harmful to Mr. Fischl, and worse yet, that Mr. Gezon for the government was going to re-open or tried to re-open the case against Mr. Fischl.

The Court was at that stage faced with, it seemed, one or two possibilities. One possibility was to try to cure any problem created by the Kerkman testimony as to Fischl by some kind of an instruction. The more I thought about that, the more I thought that was impossible. And so I settled upon the issue of severance which is now causing so much difficulty.

At that stage of the proceedings, when I announced that I was going to grant a severance, I asked Mr. Daavettila if he wanted to renew his motion for a (p. 65) severance, and he said that he did. And when he did, I granted it. And then I asked the government if there was any objection to what I had done. It said no. I asked Mr. Daavettila. Of course, he said no because he made the motion. And I asked Mr. Meldman, and he said no.

Then when I was in chambers, trying to get the jury instruction together for the Fischl case, Mr. Meldman walked in and said he had given it some additional thought, and that he believed that he should make a motion for a mistrial. I indicated to him that I would come back in the courtroom and take that motion, and I did. And it appears in the record.

I had a copy typed up by my court reporter, and Mr. Meldman makes what now in hindsight is a good motion, and comports precisely with the cases, which I hadn't read. Mr. Daavettila did not want to join in that motion. Mr. Gezon opposed it with a single three-word response, "I oppose it."

The Court then denied the motion, and then the following interesting commentary occurs on the record, quote — all of this is quote.

> "Mr. Meldman: Your Honor, we would ask one other thing. May we start back at the point of opening our case in chief?
>
> "The Court: Yes.
>
> (p. 66) "Mr. Meldman: So we are in a posture now where we have not called Mr. Kerkman?
>
> "The Court: I think that — I don't know. I haven't thought about that. Certainly, that is true as to the Fischl case because I am not going to permit them to listen to anything that he said. As to whether you have opened up your case, let me take that under advisement. Some merit. How do you understand that, Mr. Gezon?
>
> "Mr. Gezon: I have some obvious problems with that. There are a lot of things that are said already that we are going to vigorously rebut.
>
> "The Court: The only thing that I want you to think about, and supply the information to me in the intervening time, and now the intervening time is going to be quite a substantial amount of time. And one

thing that I would like you to think about, Mr. Meldman, and you, Mr. Gezon, is that at the time that that testimony started I have not granted the severance, and I have now granted the severance, and that may change the status of things. I may need to think about it.

"Mr. Meldman: Your Honor, there are two reasons: Number one, there is a two-week lapse of time. I don't think the jury's memory would be (p. 67) that good. I have to start over anyway.

"The Court: I would like to have some law in the intervening time and serve it on me, and, Mr. Gezon, the same thing.

"Mr. Gezon: I have no objection to Mr. Meldman if he wants to somehow summarize, the next time we get together.

"The Court: I don't know if that is what he is talking about. He may be talking about altering his defense.

"Mr. Meldman: Absolutely, Your Honor, I think we are in a different posture than where we started.

"The Court: I understand your argument. It has some appeal to me. I don't know where we stand on the law. Mr. Gezon, I would like both of you to address that issue to me in advance of October 1st. I think it is a significant issue. I simply don't have to rule on it right now. I am not going to. Bring the jury back, please. We are going to adjourn then."

No one served any law on me in the intervening two weeks, but before I got Mr., Mr. Meldman's motion to dismiss, I had decided in my own mind, and I now announce it, that I would have permitted Mr. Meldman to rest his case if he desired to do so. It seemed at the time, prior to thinking (p. 68) about the dismissal motion, and prior to realizing what the cases were going to say, that it seemed to me just to permit that to happen because of the severance having occurred between the time that he opened his case and the time that he — this severance happened. So I would have permitted him over objection by the government to remove Mr. Kerkman from the witness stand, and I would have instructed the jury as I did in Fischl to ignore anything that he had said in the half an hour or the hour that he was on the witness stand, if that had been Mr. Meldman's desire.

It now turns out, having read the cases that I have cited on the dismissal motion, that that comes the closest to waiving the prejudicial error to the jury because the defendant has not put on, had completed his case prior to the severance.

I don't know, and I don't mean to suggest that either lawyer here, or to the record, that that is, that that permits me to say that that jury is untainted. I don't mean to say that. I mean to say instead that it comes the closest to an untainted jury that we have come to in this courtroom.

Having ruled against you, Mr. Meldman, on the dismissal, having said what I have said about how you can alter your defense if you desire, what is your desire?

Mr. Meldman: Your Honor, I think I have to be very candid with the Court. I did try to address that first (p. 69) question. To be honest, I couldn't find an answer in any of the evidence texts or anything else. Secondly, Mr. Kerkman and I did discuss it before we had found those three cases, and the decision that we have reached without these cases was that we were going to proceed, allow him --

The Court: With him?

Mr. Meldman: To get back up, if we were going to be allowed to summarize or whatever, and go ahead, and in fact call more than the two witnesses that we had intended.

The Court: How many witnesses had you intended to call at that stage?

Mr. Meldman: Well, we had at least another —

Defendant Kerkman: Eleven.

Mr. Meldman: A total of 11.

The Court: So you had intended to present 11 witnesses to this jury?

Mr. Meldman: I have to be honest with the Court. I was precipitated with the fact that the jury came back with a guilty verdict against Fischl, where he did not put a defense in. I think we just assumed if we did the same thing, there is no reason to assume it would be any other verdict. Then we found the cases.

You know, it is a strange area, as I am sure the Court is aware. Once you find where you can look for a case like this, the rest opens up. It was finding the place.

(p. 70) The Court: It is like that in legal research.

Mr. Meldman: That is what happened. That is what we would do if that had been the only choice we had, if all motions denied, proceed with the defense. And I honestly had not thought about it in terms of the Stratton case as the Court — but that is what we would, if forced, you know, if we have no other choice.

The Court: If you-do that, I have to do something on Stratton because Stratton tells me loud and clear that I can't permit that to happen. I can't permit you to put on a defense after, after the severance. It would not be fair to Mr. Kerkman.

Mr. Meldman: We didn't think so.

The Court: What about the mistrial?

Mr. Meldman: I, I don't know. Do I assume that the Court is saying that it will not make its own motion for mistrial? I will only make it if I have to make it. If the Court puts us in that position, you know, we will officially make a motion. The government I suggest still has the option to make their own. The Court sua sponte can make its own.

The Court: I am not going to force you to do anything. The floor is yours, and you can either make a motion or not make a motion. I don't want in any way to coerce you to, into making a motion, or Mr. Kerkman to make a motion. I am not attempting to do that right now.

(p. 71) Mr. Meldman: I wasn't suggesting that right now. I didn't know whether the Court was going to indicate whether it would or would not on its own make a motion for mistrial.

The Court: I pretty well told you how I felt about whether we would go to the jury on Stratton.

Mr. Meldman: Yes, Your Honor, you did. I don't know whether we are prohibited — for not making a comment right now, or making a motion for mistrial in five minutes. I don't know. I think we have indicated to the Court if the Court is not going to do it on its own, we would do it. I would ask the Court to do it on its own first. If the Court indicates that it will not —

The Court: You want me to do that because you think that double jeopardy might attach if I do it?

Mr. Meldman: No, Your Honor. I don't think it makes a bit of difference. I think our burden is identical. I feel the defendant should not have to move for mistrial here, not having put himself in this position. I really think the burden rests with the government. I think if I could, it would be a gentlemanly thing to do, that the government do it. If we have to do it, we will.

If the Court wishes to take it upon itself — because I really feel that had the government not pushed to get this into the Fischl case, which really had nothing to do with us, and we didn't care one way or the other if it went (p. 72) in or didn't go in against Fischl, went against us, we wouldn't be here, and we wouldn't be going through what we have to go through again, had that not — now it first came up in the motion in limine.

If I can, it has been something that Mr. Gezon has done throughout the trial, is anticipation. He has anticipated a double jeopardy claim. No double jeopardy claim has been made yet, and I don't think one properly is timely

at this time. If in fact the Court grants a mistrial on whoever's behalf, and a new trial is set then, at least it is my understanding that that is the first time that a motion to dismiss on grounds of double jeopardy would be timely. And then if that motion to dismiss is denied, then that would be an appealable motion. Then that brings the issue of double jeopardy up as I understand the state of the law.

I don't think that there is a question of double jeopardy here, and I don't think it makes any difference who makes it, not as I read it. I think Scott makes it clear that unless a motion for mistrial, for example, would be made sua sponte by the Court, and we would object to the mistrial motion, that the standard is the same for us, and I think we have indicated to the Court that we would not object.

I don't think double jeopardy is really in (p. 73) issue here. If we don't have it because we bring it or you bring it, or the government brings it, we don't have it. And if we do, we do. And I don't think it makes any difference.

And I honestly don't know how the Court is going to interpret Oregon vs. Kennedy, and the word "intent." Like I say, I took it to mean something that is not accidental, not that it had to be a malicious thing or with an intent to cause. A general standard for intent is that one is presumed to know the natural consequences of one's act.

I will, if the Court wishes to give me some guidance, I will wait.

The Court: No, that is good enough. How about you, Mr. Gezon?

Mr. Gezon: In view of Mr. Meldman's position that he is going to be arguing on appeal government miscon-

duct which brought this, precipitated this, I am not making it. I vigorously oppose that. I appreciate the dilemma, but the courts have not been very clear on what amounts to manifest necessity and what the risk is when a prosecutor or the court makes its own motion for mistrial.

Let me say one more thing, Your Honor, if I may. I envisioned the course of this matter to be if a mistrial is granted that we will set it for new trial, and then there will be a motion to dismiss, which if it is denied will be appealed immediately as a, as of right, (p. 74) according to the court cases, and we will not be trying this case until after that decision is made unless, under the court cases, the court rules that the claim of the Fifth, of double jeopardy, is frivolous. But without that ruling, we will be going up to the Court of Appeals before we next convene a jury.

The Court: I understand that to be his argument. Take a short recess.

(Whereupon, recess, 10:30 a.m., reconvening 11:15 a.m.)

The Court: The record probably already shows everything that is on my mind today. I engaged in some luxurious second-thinking over the weekend when apparently within the last 15 days or so all of us have become aware of the case law with regard to severance. Certainly, I wasn't at the time that I granted the severance, and certainly Mr. Gezon wasn't, and certainly Mr. Meldman wasn't, because no one's arguments were made.

Would I have done things differently? And the answer is no because I was concerned that such egregious error

was going to occur in the Fischl case that it could never be corrected by me or by curative instructions or by, perhaps, the Court of Appeals. It was an unusual situation, but the record will show that while Mr. Kerkman was on the stand, as I have indicated, the government announced its intention to re-open proofs against Mr. Fischl, and that, (p. 75) that just couldn't have been permitted by me, and probably I wouldn't have. I never reached it.

But, certainly, I would have been in the posture of having to try to explain to the jury that what Mr. Kerkman said after Fischl's case had rested could not be used against Fischl, and that would have been impossible, which led me to do the severance that I have done.

And what I believe is going to happen is that it is simply going to prove in the long run that I should have granted a severance in the first instance. That is what it is going to prove in the long run, I believe. As I indicated this morning — I didn't put it on the record, but the record will contain it — Mr. Meldman's reason for wanting a mistrial a couple of weeks ago, while not as articulately stated as done in his brief, I think hits the issue that is raised by the cases that we have discussed on the record this morning.

And so I now proceed to make the following mistrial opinion. As everyone in this room knows, and someday certainly the Sixth Circuit will know, the Court has to move with considerable care in laying groundwork for a mistrial, so that a mistrial does not violate the defendant's right against double jeopardy pursuant to the Fifth Amendment of the United States Constitution.

The consideration underlying the provisions go (p. 76) to the prohibition against the state making repeated attempts to convict an individual. An individual is put in jeopardy once he or she is placed before a trier of fact, whether that be a jury or a judge. However, the individual's right to remain free of harassment due to multiple prosecutions must in some instances be, quote, "subordinated to the public interest in fair trials designed to end in just judgments." End quote. The quote comes from Wade vs. Hunter that I have only one cite for, and I will put it on the record. 93 Lawyers Edition 974, from of course the Supreme Court in 1949.

The courts have refused to formulate a hard and fast rule where a retrial is barred by the double jeopardy doctrine presumably because defendants might be encouraged to use such a dogmatized ruling as a litigation goal. In that respect, see United States vs. Jorn, 400 US 470. 27 Lawyers Edition 2nd 543 at 554. a 1971 opinion of the court.

> "It is well recognized that while a litigant does have a constitutional right to try the case to conclusion before a particular panel, the courts have discretionary power to order a mistrial when public justice would not be served by carrying the case to conclusion before the particular panel."

Quote from Jorn:

> "Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the

defendant's motion is necessitated by prosecutorial or judicial error. In the absence of such a motion, the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See United States vs. Perez, 9 Wheat., at 580," 6 Lawyers Edition at 166.

That, as I indicated, comes from the Jorn case in 1971.

The Jorn case and others discussed indicate the distinct settings in which a mistrial may be declared on a motion by the defendant or upon finding of manifest necessity, or by an attendant motion by the prosecution, or by the court's own motion. Although one may analyze the context separately, it is clear that the very nature of the right implicated by a mistrial, the individual's Fifth Amendment right to try a case to a conclusion before a particular panel, and to be free from prejudicial prosecutorial or judicial (p. 78) conduct, dictates in this case that a mistrial may be granted on either of the distinct bases available. That is, either on the defendant's motion or upon finding of manifest necessity.

In either of those instances, it is my judgment that a mistrial will be correctly granted.

The reason for the across-the-board finding that a mistrial is warranted is that the right or rights which commonly militate against declaring a mistrial militate in favor of granting a mistrial in this case, United States

vs. Kerkman. First, the right to try a case to conclusion before a particular panel of jurors has changed from a right to a burden in my opinion.

In defendant's brief, he notes persuasively to me by law and fact that this particular panel perhaps has been impermissibly tainted and is now predisposed to find guilt. So the right to this particular panel is disavowed by the defendant, not stolen by the prosecution.

Secondly, the right to be free from prejudicial conduct by the prosecution or by the Court necessitates a retrial before a different panel. There is no element of bad faith or harrassment tactics by either the prosecution or by the Court in this case. Neither has prejudicially denied the defendant a fair trial. Neither has delayed or prejudiced the defendant's ability to present a subsequent defense to the (p. 79) charges made against him by the grand jury.

The finding of a mistrial is in fact the only manner in which a delay and possible multiple prosecutions and appeals can be avoided. The cases cited by both parties indicate that if the case goes forward as planned, and as apparently as asked for by the prosecutor today, and if it is submitted to the same jury that has deliberated on Mr. Fischl's case, and if an appeal is subsequently filed, the case will be remanded for retrial, resulting in a lengthy, belabored, expensive, and perhaps disheartening resolution of the dispute.

It is clear that the Fifth Amendment rights of the defendant in this case where some error but no misconduct has arisen dictate a mistrial on one or all of the bases permitted by the case law authority.

The first basis was provided by the defendant's motion for mistrial made at the, a few moments after the Court had granted a severance — and indicated today that it would be re-made if the Court didn't itself declare a mistrial — as I suppose the least likely to raise the specter of a double jeopardy violation.

Quoting from Jorn again, in part:

> "Where a defendant successfully seeks to avoid his trial prior to the conclusion by motion for mistrial, the double jeopardy clause is not offended by (p. 80) a second prosecution." A quote within a quote: "a motion by defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution even if the defendant's motion is necessitated by prosecutorial or judicial error," end quote, this time quoting from the United States volumes on Jorn. It is 400 at page 45.

It is Harlan's opinion that I just quoted from.

> "Such a motion by the defendant is deemed to be a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the trier of fact," and that comes from U. S. vs. Scott which the lawyers have both, especially Mr. Meldman has argued today.

The defendant in this case, Mr. Kerkman, may argue that since he really has no choice but to ask for a mistrial that he cannot knowingly and intelligently waive his right to try the case to conclusion before this particular panel, and, therefore, his so-called waiver of his Fifth Amendment right is not a choice at all, but, rather, a coerced

result. That argument was entertained by the United States Supreme Court and rejected in United States vs. Dinitz, D-i-n-i-t-z. 424 U.S. 600, 96 Supreme Court 1075, 47 Lawyers Edition Second 267, particularly at 274 and 275, (p. 81) in 1976.

The Dinitz court expressly stated that the concepts of, quote, "knowingly and intelligently" made waiver do not apply to the mistrial context, and that the whole construction of motions for mistrial as something akin to waiver was misplaced. The court in rejecting the no choice argument reasoned that such a conclusion would result in the lower courts denying any and all manifest necessity arguments raised by any and all parties, and would require that every case be tried to a conclusion regardless of whatever obvious and reversible error had occurred, hardly a result anyone wants. "That is, the trial courts would have to follow a terribly strained and technical course to avoid the possible bar of double jeopardy even in cases where defendants had moved to mistry and start a new and valid trial." Quoting from Dinitz a single sentence:

"For if a trial judge follows that course the double jeopardy clause would present no obstacle to a retrial if the conviction is set aside by the trial judge or reversed on appeal."

The Court this morning asked Mr. Meldman whether Mr. Kerkman wanted to move for a mistrial, and Mr. Meldman asked for an opportunity to speak with Mr. Kerkman, and the Court adjourned and recessed. The record will show what Mr. Meldman said upon return. He again addressed the (p. 82) issue following a colloquy be-

tween the Court and the United States, and his remarks, of course, will appear as they occurred at that time.

But in essence, what I understood him to say was I don't think that it makes any difference with regard to the double jeopardy issue which is not ripe whether I make the motion or the government makes the motion, or the Court sua sponte declares a mistrial. And he went on to say to me, as I understood him, that if I do not sua sponte grant a mistrial, he would make a motion for the mistrial for the reasons that are so apparent and evident in this case.

Therefore, it seems to me I have offered him that opportunity to make a motion for a mistrial, and I have tried to point out to him that if there has been error of the magnitude that seemingly forces a choice on him, he, nonetheless, retains the choice to make a valid motion and terminate the discussion thereby.

The second basis for declaring a mistrial is on the Court's own motion. The Court is aware that it must tread warily in this regard, for the Jorn case cited above or by me a few minutes ago illustrates that an erroneous declaration of mistrial on the Court's own motion may violate the Fifth Amendment rights of an individual and result in a dismissal on appeal.

The Jorn case is worth some note as it (p. 83) provides a good example of a practice that I eschew. The Jorn case decided by the Supreme Court in 1971 involved a case where a defendant was charged with an income tax violation. The government called several taxpayers to testify that the defendant had aided them in preparing

false tax returns. The trial judge questioned whether these witnesses had been advised of their constitutional right not to incriminate themselves by testifying. The prosecutor said they had been advised.

The record will show that I posed the same question unbidden to Attorney Butch during the last session of this court. The right to avoid self-incrimination statements by helpful witnesses is a crucial right which trial judges must be aware of at all times to avoid an innocent witness from being victimized during a trial.

At any rate, in Jorn, unlike Kerkman and Fischl, the trial judge refused to accept the statement of the witnesses, and refused to accept the statement of the prosecution that the witnesses had been advised of their rights and were waiving them, and on its own motion the trial judge declared a mistrial because of the prosecution's delay in obtaining written waivers from the witnesses.

On appeal the defendant claimed a double jeopardy violation, and the Supreme Court agreed and dismissed the case. Actually, however, the trial judge had in the (p. 84) interim reversed his own decision to declare a mistrial and held that he had been guilty of violating the double jeopardy clause himself. So the correct way to characterize the Supreme Court holding is to say that it upheld the trial court's self-reversal, which was mandated one would think.

In examining the question of double jeopardy in the setting of a court's declaration based on its own motion, the court stated that in the necessary absence of hard and fast rules which might lead to manipulation by liti-

gants the trial court must balance the factors relevant to the decision.

The Jorn prosecution's lack of preparation and subsequent delay implicated speedy trial rights, and the continuation of the trial would have slightly deepened those implications. At the same time, the trial judge's imperious declaration of a mistrial based only on his assumption that the witnesses had been improperly advised of their rights definitely necessitated a completely new trial and was the greater violation of the two in my opinion.

Simply put, he trod too heavily and with too little care on the defendant's rights. The rule has long been stated that in order for the court to move for a mistrial on its own motion it must find that a manifest necessity exists for such a ruling. The meaning of that instructive term (p. 85) manifest necessity, was explained by the great Justice Story. Great is my definition of Justice Story.

Quoting from Justice Story:

"We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very

plain and obvious causes." 9 Wheat. at 579, United States vs. Perez.

The leading modern day cases state that there is a requirement to show manifest necessity, but the decree of necessity falls across, quote, "the spectrum of trial problems which may warrant a mistrial." That comes from Arizona vs. Washington, 434 U.S. 497, at 510, in 1978.

In the present case, United States vs. Kerkman, it is clear that we are far from the margin of necessity, and we are deeply, deeply into the area where mistrial must be declared. Clearly, on the basis of Crane, Stratton and the (p. 86) McIver cases that I cited in the motion to dismiss, this jury is no longer qualified to deliberate on Mr. Kerkman's case. The Crane case, the Sixth Circuit case, expressly stated that if a jury had already returned a verdict of guilty in regard to one defendant it is highly unlikely that the jury could be presumed to be impartial, particularly where the defendant as here has not rested his case.

Therefore, the Court takes note that there is virtually no possibility of submitting this case to the jury, and allowing the case to be submitted to the jury under any circumstances would be wasteful, and, arguably, would be prosecutorial delay, and would, arguably, invite reversal based on unconstitutional delay and harassment through needless litigation. Even in the unlikely event, and it has not occurred, that Mr. Kerkman should insist that the Court submit his case to this jury — and he has not done that — I would have to find that in this case the public's interest in fair trials designed to end in just judgments must prevail over the defendant's valued right to have his trial concluded before the first jury that was impaneled.

In the Arizona vs. Washington case, the prosecutor made a motion for a mistrial in circumstances different from the instant case. He was arguing that the defendant had impermissibly put before the jury matters which should not have been before the jury. And on a strong (p. 87) argument to the court, the court granted the prosecutor's motion for a mistrial. The Arizona ruling merely indicates the obvious fact that all parties to a criminal lawsuit have the right and the obligation to safeguard the process of the trial and jury consideration from taint.

In this case, that is to say, in the Kerkman case, the government's brief indicates its strong concurrence with the defendant's strong assertion that this case should not be submitted to the jury. Arizona clearly held that the prosecution in such case may move and argue for a mistrial.

In this case, the prosecution refuses to do so, and possibly on sound grounds that on appeal it would be in a peculiar position of having admitted that which Mr. Meldman charges, to wit, egregious prosecutor error, and unlike Arizona, where the prosecution was claiming defense error, the prosecution would seem to be pointing out to the appellate court the substance of its own error. So the Court understands why the United States might be reluctant to make a motion for a mistrial.

On the other hand, the Court does not understand why the government would argue today that the case should be submitted to the jury after its brief agrees with the taint suggested by Mr. Meldman in his brief, and thinks that the government would be in much worse position were I to

agree with that argument. For I believe that would be clearly in (p. 88) the ball park and bailiwick of a double jeopardy argument by the defendant. So I just ignore what the government said today and look at what the government said in its well written brief, and the brief, both the government's and the defendant's, that this is in fact a case of manifest necessity for all of the reasons that the record has, it seems to me, clearly pointed out.

Why do I say that? Circumstances have developed in this case that were not attributable to prosecutorial or judicial overreaching, possibly arose as a result of error by the prosecutor or even error by the Court, but not overreaching by either of those parties, that resulted in a situation where the defendant Fischl's case went to the jury in a proper fashion with able argument by counsel and with instruction by the Court. And after considerable deliberations, the jury returned a verdict, in some cases finding the defendant Fischl guilty, in other finding the defendant Fischl not guilty, and was then waiting for the continuation of the Kerkman trial; and, it must be recalled, had before it two counts of conspiracy against both Mr. Fischl and Mr. Kerkman in which no other conspirators were alleged to be around. Although the evidence showed that there might be some others, the indictment did not. And other counts of the indictment, with the exception of the two individual income tax counts, the one against Mr. Kerkman (p. 89) already having been dismissed, addressed in consecutive order both defendants, indicating that each of them either directly or aiding and abetting the other had committed the crimes alleged in the indictment. Therefore, it is apparent to me that the jury has considered at least

the question of Mr. Kerkman's involvement if not guilt in arriving at the Fischl verdicts.

Furthermore, Mr. Meldman in I thought persuasive language today argues the reasons why he needs to present a defense. He was clearly on the fence on that question. After I had declared the severance, and in my judgment watching him and listening to him, I believe it was his desire to remove Mr. Kerkman from the witness stand and to rest his case. That seemed to me patently obvious, and as I read the transcript it becomes even more obvious.

On the other hand, when he did that, something hadn't happened yet, and that was the jury hadn't considered the case against Mr. Fischl. When Mr. Meldman and Mr. Kerkman became aware that the jury had in fact convicted Mr. Fischl of some counts, it then became Mr. Kerkman's strategy and tactic, and it certainly seems reasonable, that if the jury had convicted Mr. Fischl when he put in no defense that it was provident on Mr. Meldman's part to put in a defense for Mr. Kerkman. That reaches the position that all of the courts of appeal, and the Supreme Court, have faced squarely, and, (p. 90) that is, it would be error absolutely to commit this case to the jury on the basis of their not even having heard any of the defense. They had heard perhaps one-fifth of one of 11 witnesses before they retired to consider the verdict. And now they would have to hear 11 witnesses plus the arguments of counsel, plus the Court's instructions, which would be similar to if not identical to the instructions given in the Fischl case.

It is obvious, it seems to me, to the lawyers in this courtroom, to myself, and to anyone who reads this record and had been trained in law that that cannot be permitted

to happen. If that is not manifest necessity, I don't think I will see manifest necessity in this lifetime. It would be, I can't think of words strong enough to express my thought. It would be the worst thing that I have ever done as a Judge to submit this case to the same jury in this posture on Mr. Kerkman's case now, and I refuse to do it, and I won't do it.

Now I am granting a mistrial on the basis of manifest necessity. In doing so, I however, am not unmindful of the sound arguments made by Mr. Meldman on the last day that he was in this courtroom asking for a mistrial, and had I read, or had I been aware of even the reasoning of Crane, Stratton, McIver, those three at least, I would have granted the mistrial at that moment. And so the record should (p. 91) show that I believe very much that I was in error on denying the motion for a mistrial when he made it. I grant it today. I would also grant it today if he had had to make the motion, but I have taken the responsibility essentially myself as I feel I must do under the circumstances of this case.

. . . . . .

SUPREME COURT OF THE UNITED STATES

No. A-478

CHARLES H. KERKMAN,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITON FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 16, 1986.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 17th
day of December, 1985.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

File No. G84-17-01CR

UNITED STATES OF AMERICA,

Plaintiff,

v

CHARLES H. KERKMAN,

Defendant.

ORDER

(Filed January 6, 1986)

On December 23, 1985 Defendant's recently appointed attorney, Dennis Kolenda, filed a Motion and Brief to Adjourn Trial. Section 3161(e) of the Speedy Trial Act of 1974 reads in pertinent part: ". . . the trial shall commence within seventy days from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e) In his motion, Defendant states that he will be filing a petition for certiorari to the United States Supreme Court. Further, said petition is to be filed by January 16, 1986. Since additional time will be required for the Supreme Court to rule on Defendant's petition,

IT IS HEREBY ORDERED that the action occasioning the retrial will not be considered final until the petition has been disposed of by the Supreme Court; a copy of the petition and proof of service to be filed;

IT IS FURTHER ORDERED that the pretrial and trial shall be adjourned until a ruling on Defendant's petition is made.

DATED in Kalamazoo, MI: /s/ Richard A. Enslen
January 3, 1986 U.S. District Judge

TEXT OF PERTINENT STATUTES

18 U.S.C. § 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

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18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

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18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent

or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

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18 U.S.C. § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

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18 U.S.C. § 2314

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited.

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

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26 U.S.C. § 7206

Any person who —

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a writ-

ten declaration that it is made under the penalties of perjury, and which he does not believe to be truen and correct as to every material matter; or

(2) Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or preparation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries. Simulates or falsely or fraudulent executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud. Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade, or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements. In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully —

(A) Concealment of property. Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying and destroying records. Receives, withholds, destroys, mutilates or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1224

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES H. KERKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1224

CHARLES H. KERKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 8-17) that the Double Jeopardy Clause bars his retrial because his motion for a mistrial was prompted by a midtrial ruling that he did not seek and that undermined his ability to obtain a fair trial.

1. On January 30, 1984, petitioner and co-defendant Robert D. Fischl were indicted by a federal grand jury in the Western District of Michigan for mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343 (six counts), interstate transportation of property taken by fraud, in violation of 18 U.S.C. 2314 (two counts), and conspiracy to commit mail and wire fraud and to defraud the IRS, in violation of 18 U.S.C. 371 (two counts). Each defendant was also charged in separate counts with aiding and assisting in the preparation of a false and fraudulent tax return, in violation of 26 U.S.C. 7206.

Approximately seven months later, a joint trial on these charges commenced.[1] After the government rested its case, co-defendant Fischl also rested without presenting any evidence, and the trial court instructed the jury that the case against Fischl was closed. The proceedings were then recessed for four days to give petitioner additional time to prepare his case. When the trial resumed, petitioner took the stand. After petitioner testified on direct examination for a short time, co-defendant Fischl requested a jury instruction to the effect that petitioner's testimony should not be considered against Fischl. The government responded that the jury should be allowed to consider petitioner's testimony in deciding Fischl's case. Pet. App. 5-6.

The district court ruled that the proof concerning Fischl's case had been closed and that it would not permit the introduction of any additional evidence against him. The court noted that it had the option of allowing the joint trial to proceed with "a strong limiting instruction" to the jury prohibiting the use of petitioner's testimony against Fischl, but concluded that it would grant Fischl's motion for a severance (Pet. App. 21). The court then announced that the proceedings against petitioner would be temporarily adjourned and the case against Fischl submitted to the jury. Petitioner did not initially object to the procedure, but shortly thereafter requested a mistrial on the ground that he would be prejudiced by the jury's deliberation of Fischl's case. The court denied petitioner's motion. Thereafter, the jury convicted Fischl on six counts, five of which also named petitioner. Pet. App. 6-8, 14-30.

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[1]The pertinent proceedings are summarized in the opinion of the court of appeals (Pet. App. 2-3) and in the district court's opinion (*id.* at 5-10). Relevant record excerpts are included in the petition (*id.* at 14-78).

One week later, petitioner moved for dismissal of the charges against him, contending that the jury was irreparably tainted by its deliberations on the Fischl case and that the government was responsible for that taint because its actions led to the "severance." At the hearing on that motion (Pet. App. 34-59), the court and the parties agreed that the submission of Fischl's case to the jury tainted the jury with respect to petitioner's case.[2] The court stated, however, that it was "inclined" to deny dismissal. The court then suggested that mistrial would be the appropriate remedy and solicited the parties' views on that proposal. The government asked that the trial proceed notwithstanding the jury taint. Defense counsel consulted petitioner and advised the court (Pet. App. 43): "[Petitioner] feels that he has no choice, and he will have to ask that the proceedings that we are in now be terminated. It is his opinion now that he could not obtain a fair and impartial trial by the jury we have, and if his only remedy is a mistrial, then that would be the remedy that he would have to accept."

Thereupon, the court definitively denied dismissal and asked petitioner how he wished to proceed. Petitioner asked the court to order a mistrial "on its own" to which he "would not object," but he added that "[i]f we have to do it [*i.e.*, move for mistrial] we will" (Pet. App. 62-63). The district court then ordered a mistrial "on the basis of manifest necessity" (Pet. App. 3, 78). A new trial was scheduled to commence in two months.

2. Petitioner subsequently filed a motion to dismiss on double jeopardy grounds, contending that the midtrial "severance" was tantamount to a mistrial for which there was no "manifest necessity." In its memorandum opinion

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[2]See *United States* v. *McIver*, 688 F.2d 726, 729-730 (11th Cir. 1982); *United States* v. *Stratton*, 649 F.2d 1066, 1081 (5th Cir. 1981); *United States* v. *Crane*, 499 F.2d 1385 (6th Cir.), cert. denied, 419 U.S. 1002 (1974).

denying that motion (Pet. App. 5-13), the district court ruled that "[o]nce the guilty verdict was rendered against Fischl by the jury," petitioner could not be fairly tried before the same jury and therefore his declaration of a mistrial was justified by "manifest necessity." The court also rejected the argument that the midtrial ruling itself amounted to a mistrial and ruled that, in any event, there was manifest necessity for the decision to submit Fischl's case to the jury while suspending consideration of petitioner's case because "[i]n light of the circumstances existing at that point in the trial, there was no viable alternative to severance" (*id.* at 12).

The court of appeals agreed that the Double Jeopardy Clause did not bar petitioner's retrial (Pet. App. 1-4). The court explained that the mistrial was necessary because "the premature submission of co-defendant Fischl's case to the jury had irretrievably prejudiced [petitioner's] own right to a fair trial." The court of appeals noted further that "the record * * * [leaves] no doubt that [petitioner] had expressed a preference to renew his previous motion for a mistrial if the court were to deny his motion to dismiss and compel him then to proceed with the trial before the original jury." Finally, the court observed that although the submission of Fischl's case to the jury was error, "there was a total absence of any bad faith or intent to harass or prejudice [petitioner]." *Id.* at 4.

3. It is well established that, when a defendant successfully moves for a mistrial, the Double Jeopardy Clause bars a retrial only if there was prosecutorial misconduct deliberately designed to provoke the defendant into moving for a mistrial. *Oregon* v. *Kennedy*, 456 U.S. 667 (1982); *Arizona* v. *Washington*, 434 U.S. 497 (1978). Petitioner does not dispute (see Pet. 13) that he sought and consented to the court's declaration of a mistrial after the jury convicted co-defendant Fischl and, indeed, he appears to take the

position that the mistrial was in any event justified by manifest necessity. Thus, it is clear that the actual declaration of the mistrial does not create a double jeopardy bar.

Petitioner's argument instead rests on the proposition (Pet. 15) that "the mid-trial severance [of his co-defendant] was tantamount to a mistrial," and the court's action at that point was neither sought by petitioner nor justified by manifest necessity. The courts below correctly rejected this contention. The trial court's decision to submit co-defendant Fischl's case to the jury and then later resume the proceedings against petitioner with the same jury may well have been error, but it was not tantamount to declaring a mistrial with respect to petitioner. It is clear that the district court intended to proceed with the trial of petitioner's case after the jury returned a verdict in Fischl's case; therefore, the order in question plainly was not intended as a declaration of mistrial.

Nor was it equivalent as a practical matter to declaring a mistrial. First, if Fischl had been acquitted, there would have been little basis for granting a mistrial motion by petitioner. See *United States* v. *Crane*, 499 F.2d 1385, 1388 (6th Cir.), cert. denied, 419 U.S. 1002 (1974). Even after the jury returned a guilty verdict against Fischl on some counts, thereby handicapping petitioner's defense, petitioner's trial was not automatically terminated. At that point, petitioner was "faced with a trial strategy decision a defendant often encounters after prejudicial error has allegedly occurred, whether to move for a mistrial or to proceed on to a verdict in the hope of obtaining an acquittal." *United States* v. *Miller*, 742 F.2d 1279, 1285 (11th Cir. 1984), cert. denied, No. 84-1088 (Feb. 19, 1985). Petitioner could have elected to allow the trial to proceed to completion. If he had been convicted, his remedy would have been an appeal and a new trial.[3] Instead he elected to seek termination of the trial.

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[3]Indeed, the record reflects that this possibility of continuing with the trial was discussed at the hearing. See Pet. App. 48-49, 68.

While this course of action spared him the need to seek appellate reversal of a conviction, there is no reason why it should spare him the need to undergo a new trial. Unless the error is occasioned by prosecutorial misconduct designed to provoke a mistrial, "[i]f the judge makes a procedural mistake during trial, and the result is not an 'acquittal,' the mistake may be corrected and the defendant tried again." *United States ex rel. Young* v. *Lane*, 768 F.2d 834, 839 (7th Cir. 1985), cert. denied, No. 85-5399 (Nov. 4, 1985). While it is unfortunate that the error made by the trial court impaired petitioner's opportunity to receive a fair hearing before the first trier of fact, recognized double jeopardy principles establish that the result of such an error is not the windfall of denying the prosecution any opportunity to bring its case to verdict.

The cases on which petitioner relies (see Pet. 11) are inapposite because in those cases the defendant did not have an opportunity to proceed to verdict before the first factfinder. While each of those cases involved a joint trial in which the court concluded in the midst of the trial that the trial could not proceed against all defendants, there is no doubt that the court in each of those instances resolved the problem by declaring a mistrial immediately and terminating the trial against one of the defendants without his consent.[4] The defendants in question therefore had no opportunity to receive a verdict at the hands of the first factfinder.

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[4]In *United States* v. *Glover*, 506 F.2d 291, 293 (2d Cir. 1974), and *United States* v. *Posner*, 764 F.2d 1535 (11th Cir. 1985), the trial court declared a mistrial as to one of the defendants because of *Bruton* problems (see *Bruton* v. *United States*, 391 U.S. 123 (1968)) raised during trial by the admission of the statements of one of the defendants. The other defendants had not rested, and the court immediately declared a mistrial; it did not consider holding the trial of the severed defendants in abeyance. In *United States* v. *Tinney*, 473 F.2d 1085 (3d Cir.), cert. denied, 412 U.S. 928 (1973), the court declared a mistrial as to one defendant when he did not appear in court on time and the court wished to proceed with the trial.

Here, by contrast, the court did not declare a mistrial. It submitted Fischl's case to the jury and then continued with petitioner's case. It was petitioner's decision not to allow his case to proceed to verdict; in the absence of a deliberate attempt by the prosecution to provoke a mistrial, there is no double jeopardy bar to one complete prosecution of petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1986